97

(1)

Supreme Court, U.S.
FILED

No. 08-39

JUL 03 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

# In The
# Supreme Court of the United States

◆

CHARLES T. HUTCHINS,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent.*

◆

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Third Circuit**

◆

## PETITION FOR A WRIT OF CERTIORARI

◆

CHARLES T. HUTCHINS, ESQ.
*Petitioner, Appearing Pro Se*
40009 Coliseum Way
Murrieta, California 92562
Phone: (703) 673-7021
E-Mail: FrontLinesUSA@aol.com

*Baghdad, Iraq, Contact Information:*
c/o SKA/SkyLink Arabia – Iraq
APO AE 09342
Iraq Cell: 011-964-0790-110-8865

## QUESTIONS PRESENTED

1. WAS BUSINESS THAT PURCHASED ALL RIGHTS TO NSF AND CLOSED ACCOUNT CHECKS A FDCPA-EXEMPT CREDITOR OR A DEBT COLLECTOR, AND WAS THE COURT'S SUBSTITUTION OF A NEW "CREDITOR TEST" FOR THE FDCPA'S "CREDITOR TEST" ERROR THAT SETS DANGEROUS PRECEDENT AND INTRUDES INTO CONGRESS' LEGISLATIVE DOMAIN?

2. ARE INDIVIDUALS WHO ISSUE (AND FAIL TO MAKE RESTITUTION FOR) NSF AND CLOSED ACCOUNT CHECKS CONSUMERS UNDER THE FDCPA, EVEN AFTER STATE CRIMINAL STATUTES AND STATE PRESUMPTIONS OF KNOWLEDGE AND INTENT ATTACH?

3. IS THE FEDERAL TRADE COMMISSION ACT VIOLATED IF NO HARM TO COMMERCE OR CONSUMERS HAS BEEN DEMONSTRATED?

## PARTIES

The Plaintiff/Appellee in this case is the Federal Trade Commission.

The Defendants/Appellants in this case are Check Investors, Check Enforcement, Jaredco, Barry Sussman, and Charles T. Hutchins, Esq. Charles T. Hutchins is appearing pro se.

## CORPORATE LISTINGS

Petitioner Charles T. Hutchins is an attorney licensed to practice law in the State of New Jersey. Charles T. Hutchins is not a corporation. Hutchins' legal services corporation, Hutchins Legal Services, Inc., was not named as a party to this litigation and is not a party to this litigation.

Check Investors, Check Enforcement & Jaredco are all privately-held corporations.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED .................................. i

PARTIES .................................................... ii

CORPORATE LISTINGS ...................................... ii

APPENDIX .................................................. iv

TABLE OF AUTHORITIES .................................. v

ORDERS & OPINIONS BELOW .......................... 1

STATEMENT OF JURISDICTION ........................ 2

FEDERAL STATUTES ......................................... 2

STATEMENT OF THE CASE ............................... 3

REASONS FOR GRANTING THE PETITION..... 4

I. Petitioners Who Purchased All Rights To NSF and Closed Account Checks Were FDCPA-Exempt Creditors, Not Debt Collectors. Court's Substitution of a New "Creditor Test" for the FDCPA's "Creditor Test" Was Error That Sets Dangerous Precedent and Intrudes into Congress' Legislative Domain ........................................ 4

II. Individuals Who Issue (and Fail to Make Restitution for) NSF and Closed Account Checks Are Not FDCPA Consumers After State Criminal Statutes and State Presumptions of Knowledge and Intent Attach .......... 10

III. The Federal Trade Commission Act Is Not Violated Where No Harm to Commerce or Consumers Has Been Demonstrated ......... 16

CONCLUSION ................................................ 19

TABLE OF CONTENTS – Continued

Page

APPENDIX

Third Circuit Panel Decision ............................ App. 1
US District Court Order ................................... App. 35
Rehearing Petition Filing Extension ................ App. 58
Sur Petition for Rehearing En Banc Denial ..... App. 59
Sur Petition for Panel Rehearing Denial ......... App. 61
Writ of Certiorari Filing Extension .................. App. 63
FTC Act ............................................................ App. 64
FDCPA ............................................................. App. 81

# TABLE OF AUTHORITIES

Page

*A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020 (Fed. Cir. 1992) ........ 13

*Alibrandi v. Financial Outsourcing Services, Inc.*, 333 F.3d 82 (2d Cir. 2003) ........ 6, 7

*Bass v. Stolper, Koritzinsky, Brewster & Neider*, 111 F.3d 1322 (7th Cir. 1997) ........ 12, 14

*Beggs v. Rossi*, 145 F.3d 511 (2d Cir. 1998) ........ 12

*Berman v. CG Services*, 146 F.3d 482 (7th Cir. 1998) ........ 12

*First Gibraltar Bank, FSB v. Smith*, 62 F.3d 133 (5th Cir. 1995) ........ 12

*FTC v. Check Investors, Inc.*, 502 F.3d 159 (3d Cir. 2007) ........ *passim*

*Hawthorne v. Mac Adjustment*, 140 F.3d 1367 (11th Cir. 1998) ........ 12

*Mabe v. G.C. Services Ltd.*, 32 F.3d 86 (4th Cir. 1994) ........ 12

*Pollice v. National Tax Funding*, 225 F.3d 379 (3d Cir. 2000) ........ 12

*Richards v. United States*, 369 U.S. 1 (1962) ........ 10

*Riebe v. Juergensmeyer & Associates*, 979 F.Supp. 1218 (N.D.Ill. 1997) ........ 12

*Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003) ........ 4

*Skerry v. Mass. Higher Educ. Assistance Corp.* 73 F.Supp.2d 47 (D.Mass. 1999) ........ 6

## TABLE OF AUTHORITIES – Continued

Page

*Staub v. Harris*, 626 F.2d 275 (3d Cir. 1980) .............12

*Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3rd Cir. 1987) .............9, 11, 12, 13

FEDERAL STATUTES

15 U.S.C. § 41(a) .............2

15 U.S.C. § 45 .............16

15 U.S.C. § 1692 .............*passim*

28 U.S.C. § 1254(1) .............2

28 U.S.C. § 1291 .............2

28 U.S.C. § 1331 .............2

MISCELLANEOUS

Blacks Law Dictionary 449 (8th ed. 2004) .............6

2 Wigmore, Evidence (2d ed. 1923) § 1536 .............13

## ORDERS & OPINIONS BELOW

The September 6, 2007, Order of the Court of Appeals for the Third Circuit, for Case Nos. 05-3558 & 05-3957, whose judgment is herein sought to be reviewed, is reprinted as App. 1.

The July 15, 2005, Order of the U.S. District Court for the District of New Jersey, for Case No. 03-2115, reprinted as App. 6.

The November 29, 2007, Order of the Court of Appeals for the Third Circuit Extending the Time to File Petitions for Rehearing to December 6, 2007, is reprinted as App. 58.

The February 6, 2008, Order of the Court of Appeals for the Third Circuit, for Case No. 05-3957, denying the petition by Appellants Check Investors, Check Enforcement, Jaredco and Barry Sussman, for a panel rehearing, is reprinted as App. 59.

The February 6, 2008, Order of the Court of Appeals for the Third Circuit, for Case No. 05-3558, denying the Appellant Hutchins' petition for rehearing en banc, is reprinted as App. 61.

The April 24, 2008, Extension of Time to 7/5/2008 to File Writ of Certiorari, is reprinted as App. 63.

◆

## JURISDICTION

The District Court had jurisdiction over the FTC's civil complaint under 28 U.S.C. § 1331. The Appellate Court had jurisdiction over the District Court's final order under 28 U.S.C. § 1291. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1). On April 24, 2008, under No. 07A855, Justice Souter extended until Saturday, July 5, 2008, the date for filing this petition, which is thus timely filed on or before the first business day thereafter.

◆

## FEDERAL STATUTES

This petition involves provisions of the Federal Trade Commission Act, 15 U.S.C. § 41(a). The full text of this statute section is set forth at App. 64-80. This petition also involves provisions of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq. The full text of this statute is set forth at App. 81-104.

◆

## STATEMENT OF THE CASE

The Federal Trade Commission ("FTC") brought a civil action for alleged violations of the Fair Debt Collection Practices Act ("FDCPA") and the Federal Trade Commission Act ("FTCA") against Petitioners who were recovering restitution from individuals who issued non-sufficient fund checks and closed account checks (collectively "NSF checks").

The Complaint was filed by the FTC on May 12, 2003. On August 14, 2003, the New Jersey District Court entered an Order for a Preliminary Injunction against Appellants and denied Appellants' Motion to Dismiss. On July 15, 2005, the District Court denied Appellants' Motions for Summary Judgment and granted Summary Judgment, in the amount of $10.2 million, in favor of the FTC. A permanent injunction was also issued. Notice of Appeal was filed by Appellant Charles Hutchins ("Hutchins") on August 2, 2005. Notice of Appeal was filed by Appellants Check Investors, Check Enforcement, Jaredco and Barry Sussman ("Check Investors") on August 17, 2005.

Check Investors collected restitution for NSF checks.[1] The vast majority of checks for which Check Investors sought restitution, were purchased, with ***all*** rights, from check guarantee companies including Telecheck, Certegy and CrossCheck. Check Investors contracted to ***only*** purchase NSF checks from these check guarantee companies. FDCPA disclaimers were not provided. Check Investors and legal counsel Hutchins established numerous procedures to screen out innocent victims of fraud, identify theft, checks listed in bankruptcy, stop-payment checks, post-dated checks and disputed checks so recovery actions related only to NSF checks. Recovery actions were terminated as soon as it was determined that a check fell into another category (i.e., stop-payment, identity theft, bankruptcy, etc.).

---

[1] 2006 Statistics from the American Banking Association, American Collectors Association and the Nilson Report show check fraud losses to be in excess of twenty billion dollars.

◆

## REASONS FOR GRANTING THE PETITION

### I. Petitioners Who Purchased All Rights To NSF and Closed Account Checks Were FDCPA-Exempt Creditors, Not Debt Collectors. Court's Substitution of a New "Creditor Test" for the FDCPA's "Creditor Test" Was Error That Sets Dangerous Precedent and Intrudes into Congress' Legislative Domain.

The FDCPA defines a creditor as

> "any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. § 1692a(4). (App. 83).

In evaluating the Appellants' status, the Appellate Court stated: "Admittedly, ***Check Investors appears at first blush to satisfy the statutory definition of a creditor.*** (App. 28). (emphasis added). The Appellate Court then referenced the Seventh Circuit in *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003), that "for debts that do not originate with the one attempting collection, but are acquired from another, ***the collection***

***activity related to that debt could logically fall into either category.***" (App. 29). (emphasis added). This is not what the clear meaning of the FDCPA statutory language says. The Appellate Count then adds,

> "As the court explained in *Schlosser*, "[i]f the one who acquired the debt continues to service it, it is acting much like the original creditor that created the debt. On the other hand, if it simply acquires the debt for collection, it is acting more like a debt collector." *Id.* Thus, in determining if one is a "creditor" or a "debt collector," courts have focused on the status of the debt at the time it was acquired. 15 U.S.C. § 1692a controls that inquiry. (App. 29).

The Appellate Court concludes that, since Appellants' actions involve collection efforts, but not servicing activity, the Appellants are debt collectors, not creditors. This conclusion is flawed for several reasons. The Court noted that "Congress has unambiguously directed our focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA," (App. 30), however, the test has several parts – all which must be satisfied, and the "servicing versus collection" test used by the court is not the test from the statute and is wrong.

First, if the person offered or extended credit creating a debt . . . he or she is a creditor and exempt from the provisions of the FDCPA. (App. 83). Second, if the person is one to whom a debt is owed . . . he or she is a creditor and exempt from the provisions of the FDCPA, *unless* the person received an assignment or transfer of a debt in default *solely for the purpose of facilitating collection of such debt for another*. (App. 83).

Appellants did receive an assignment or transfer of a debt. Was the debt in default at the time of the assignment or transfer? This was assumed by the FTC, and even by the court, but no evidence or argument was presented by the FTC as to if or when default occurred. Hutchins argues that NSF checks are convenient money substitutes and unconditional promises to pay and cannot be debts in default as contemplated by the FDCPA. The Appellate Court disagreed, quoting Blacks Law Dictionary 449 (8th ed. 2004), stating that "default is the omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due." (App. 26). However, in *Alibrandi v. Financial Outsourcing Services, Inc.*, 333 F.3d 82 (2d Cir. 2003), Appellant Alibrandi also cited to Blacks Law Dictionary definition of default to support his proposition that a debt is in default immediately after it first becomes due. The Court disagreed, observing that "courts have repeatedly distinguished between a debt that is in default and a debt that is merely outstanding." *Id.* at 86. The Court cites to *Skerry v. Mass. Higher Educ. Assistance Corp.*, 73 F.Supp.2d 47, 51 (D.Mass. 1999) to make the point that "only after some period of time does an outstanding debt go into default." The Court[2] notes that *Alibrandi* cites no other authority than Blacks that default occurs immediately. Here too, neither the FTC nor the Court cite any authority other than Blacks Law Dictionary in support of the proposition that the checks were in default when purchased by Check Investors. In the FTC's pleadings and arguments before the U.S. District Court and the Third Circuit there was no argument made and no evidence presented as to when, if ever, the NSF checks went into default. Neither was there any proof produced that the bad check writers had ever been notified that their NSF check(s) was/were in default.

The critical question is: was the assignment or transfer of the NSF checks *solely* for the purpose of facilitating collection of such debt *for another*? The answer is **NO!** Check Investors purchased the NSF checks outright with all rights. All the risk and costs of recovery passed on to Check Investors. No portion of the amount recovered was ever paid to the firms that sold the checks to Check Investors. Because the

---

[2] In Footnote 5 the Alibrandi Court states "[u]ntil Congress ends the statutory silence surrounding the term "default" we conclude that the interests of debtors, creditors, collectors, and debt service providers will be best served by affording creditors and debtors considerable leeway contractually to define their own periods of default . . . " *Alibrandi* at 87. However, NSF checks are not contracts within which the terms of default can be enumerated. This supports Hutchins' argument that Congress never intended the FDCPA to apply to NSF checks.

NSF checks were not transferred to Check Investors ***solely*** for the purpose of facilitating collection of such debt ***for another*** the FDCPA "creditor test" clearly defines Check Investors as an exempt Creditor . . . even if the NSF checks were in "default."

The Court disregards the results of this analysis. Instead, the Court applies a different test.[3] This test looks to whether Check Investors intended to "service" the purchased debt. The Court referenced a discussion in the *Schlosser* case. (App. 29). This test does not address statutory provisions of the FDCPA, and its use would effect results not intended by Congress. If Congress wanted the issue of "collecting versus servicing" to be a pivotal determining factor in segregating "creditors" from "debt collectors," Congress was perfectly capable of inserting this language into the FDCPA. Congress chose not to incorporate this test into the FDCPA, and use of this "collecting versus servicing" test by the Court to effect a different result than the FDCPA creditor test, as enacted, would produce, is an impermissible substantive change to the FDCPA.[4]

---

[3] This "servicing test" was not constructed to resolve some ambiguity within the statutory language or to deal with some unanticipated set of circumstances. Rather, the test was constructed to produce a result different than the result produced by using the statutory test.

[4] In § 1692*l*(d) of the FDCPA Congress made it clear that the FDCPA was not to be changed by any entity other than Congress. This section provides: "Neither the Commission nor any other agency referred to in subsection (b) may promulgate

(Continued on following page)

Additionally, the "collecting versus servicing" test would lead to results that even the Court does not anticipate or intend. For instance, if a business entity sells its accounts receivable at a discount to a factoring firm that only intends to collect these debts, the "collecting versus servicing" test would disqualify the factor firm as a creditor. However, the FDCPA classifies such a factoring firm as a Creditor. The test requiring some degree of servicing beyond collecting totally eviscerates the "**or to whom a debt is owed**" language in 1692a(4). Inconsistent results are a certainty, and commerce will be negatively affected.

Absent use of this flawed, non-statutory "collecting versus servicing" test, Check Investors does far more than "***appear at first blush*** to satisfy the statutory definition of a creditor," it completely satisfies the statutory definition of a FDCPA-exempt creditor.

The Petitioners should be able to rely on the plain language of the FDCPA and should not have to guess what test a court will use. Fairness dictates that the retroactive application of a reversal of the established judicial precedents of *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3rd Cir. 1987) and *Pollice v. National Tax Funding*, 225 F.3d 379 (3d

---

trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this title." (App. 102). The Third Circuit, with this re-writing of the creditor test has done what Congress forbade the FTC from doing.

Cir. 2000), resulting in a $10.2 million judgment against Petitioners, should not be upheld.

## II. Individuals Who Issue (and Fail to Make Restitution for) NSF and Closed Account Checks Are Not FDCPA Consumers After State Criminal Statutes and State Presumptions of Knowledge and Intent Attach.

The FDCPA defines a consumer as "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. § 1692a(3). (App. 25).

Focusing on the "any" before "natural person" and the "any" before "debt," the Appellate Court concludes that the FDCPA does not make any exceptions or distinctions and that even criminals and tortfeasors are entitled to the protections of the FDCPA. (App. 25).

Statutory provision must be read within the context of the entire statute. This is fundamental in conducting statutory analysis. One word within one section, by itself, is not instructive of the meaning and intent of an entire statute.[5] The FDCPA is a consumer protection statute designed to protect consumers. Section 1692a(3) of the FDCPA must be analyzed within this framework. There is a vast body of FDCPA law that establishes that the FDCPA does not apply to cable signal pirates, shoplifters, child support payments, taxes, business debt, tort recoveries, fraud and sewer assessments.

---

[5] The Court, in *Richards v. United States*, 369 U.S. 1, 11 (1962) stated "we believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act . . . "

The "any debt" this section refers to is any debt incurred *by a consumer* while acting as a consumer. It could not possibly mean any debt whatsoever. Such an all-inclusive interpretation of the word "any" would require inclusion of shoplifters, cable signal pirates, child support payments, tort recoveries, government taxes and assessments, and fraud, into the categories of debts covered by the FDCPA. No prior FDCPA decision in any court in the United States stands for this proposition.

The Appellate Court erred in its conclusion that criminals and tortfeasors are not excluded from the protections of the FDCPA because there are no "fraud exceptions" or "tort exceptions" to the all inclusive "any debt" language of 15 U.S.C. § 1692a(3). (App. 25). The Appellate Court's "crimes and torts" holding here would vastly expand application of the FDCPA far beyond Congress' intent and effectively constitute a reversal of the holdings in both *Zimmerman* and *Pollice*. If crimes[6] and criminals are protected by the FDCPA, those who stole cable signals in *Zimmerman* would now be entitled to FDCPA protections. Similarly, if "any" debt is covered by the FDCPA, collection of the sewer tax assessments at issue in *Pollice* would now be subject to provisions of the FDCPA. No other court in the United States has rendered such a decision.[7] The Third Circuit has clearly rewritten the language and changed the intent of the FDCPA, to a degree not contemplated by any other court.

---

[6] The U.S. Secret Service and Department of Justice concurrently investigate check fraud as a crime.

In *Zimmerman*, the Court of Appeals for the Third Circuit held that the criminal act of cable signal piracy was not subject to the provisions of the FDCPA. Here, the failure to make restitution for NSF checks, within a time period set by each state, constitutes presumptive acts of check fraud. Appellants' case here is stronger than HBO Affiliates' case in *Zimmerman* because every state has enacted statutory criminal presumptions[8] of knowledge and intent that attach if restitution for the NSF check is not made within a prescribed time. There were no state statutory presumptions of knowledge or intent in *Zimmerman*. A statutory presumption is a rule of evidence, "shifting the burden of proof . . . declaring that the main fact in issue will be inferred or assumed from certain other designated fact or facts until evidence to the contrary is introduced." 2 Wigmore, Evidence (2d ed. 1923) § 1536.

---

[7] See *Hawthorne v. Mac Adjustment*, 140 F.3d 1367 (11th Cir. 1998), "not all obligations to pay are "debts" under FDCPA" (citing to *Bass v. Stolper, Koritzinsky, Brewster & Neider*, 111 F.3d 1322 (7th Cir. 1997)). See *Mabe v. G.C. Services Ltd.*, 32 F.3d 86 (4th Cir. 1994), (child support payments not FDCPA debts); *Beggs v. Rossi*, 145 F.3d 511 (2d Cir. 1998) (property taxes on vehicles not FDCPA debts); *Staub v. Harris*, 626 F.2d 275 (3d Cir. 1980) (per capita taxes not FDCPA debts); *Pollice v. National Tax Funding*, 225 F.3d 379 (3d Cir. 2000) (property taxes not FDCPA debts); *Berman v. CG Services*, 146 F.3d 482 (7th Cir. 1998) (unemployment insurance contributions not FDCPA debts); *First Gibraltar Bank, FSB v. Smith*, 62 F.3d 133 (5th Cir. 1995) (commercial transactions not FDCPA debts); *Hawthorne v. Mac Adjustment*, 140 F.3d 1367 (11th Cir. 1998) (insurance subrogation tort claim not FDCPA debt), and *Riebe v. Juergensmeyer & Associates*, 979 F.Supp. 1218 (N.D.Ill. 1997) (library fine not FDCPA debt).

Regarding the legal effect of a presumption, the Court, in *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1037 (Fed. Cir. 1992), held that where presumption applies, the presumed fact "must be inferred, absent rebuttal evidence."

Hutchins argues that, in representing the bad check writers, the FTC was required to rebut the rebuttable presumptions as to the bad check writers' knowledge (of insufficient funds) and intent (to commit check fraud or theft by deception) before going forward with its case against Petitioners. These presumptions have shifted a burden on to the bad check writer to make some showing that they did not have the requisite knowledge or intent. No showing, at any level, has been made to rebut these presumptions. Although these presumptions relate to a criminal act and the FTC's case against Petitioners is a civil suit, the FTC should not be permitted to ignore the application of criminal statutes and the legal effect of these presumptions while representing to the Court that the bad check writers are merely victimized consumers.

---

[8] Rule 301 of the Federal Rules of Evidence states that "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption . . ."

The Appellate Court erred in its reliance on the flawed reasoning in *Bass v. Stolper, Koritzinsky, Brewster & Neider*, 111 F.3d 1322 (7th Cir. 1997), where the Court indicated that it was reluctant to judicially create a "fraud exception" that was not in the FDCPA.[9] *Bass* at 1329. (App. 21-24). It is not required, indeed, it is not the practice, for Congress to list all the things that are excepted from the legislation they enact. There is no tax exception, child support exception, tort exception or theft exception set forth in the FDCPA, yet every court that has reviewed the statute has found that taxes, child support payments, tort settlements and obligations to make restitution for theft are not FDCPA debts. Still, the Seventh Circuit in *Bass* may have been troubled by the general unqualified statement by the *Bass* Defendants that all dishonored checks are fraudulent. Petitioners have not made any such representations.[10]

---

[9] In *Bass*, the defendants did not own the checks, and collected on stop-payment, post-dated and identity-theft checks that are subject to the provisions of the FDCPA.

[10] Petitioners agree that the FDCPA applies to the general act of payment for "money, property, insurance, or services" with

(Continued on following page)

It would be more legally accurate to say that 'a check, dishonored for insufficient funds or because it was written on a closed account, and for which restitution has not been made within the statutory period, and for which statutory presumptions of knowledge of insufficient funds, and/or intent that the check not be paid, and/or intent to commit check fraud/theft by deception have attached, is not a debt under the FDCPA.'

Check Investors contracted only to buy NSF and Closed Account checks. Some of the vendors Check Investors purchased checks from did, in error, include other checks. Check Investors terminated collection action against consumers who demonstrated that they issued a post-dated check, stopped payment on the check, filed bankruptcy, or were the victims of forgery, fraud or identity theft, so these groups of consumers were protected. Of all the different types of checks, Check Investors only sought recovery for NSF checks that had been issued more than 120 days previously.[11]

---

a check. Appellants agree that if a consumer, motivated by a legitimate and actual dispute with a merchant or vendor, stops payment on a check, the provisions of the FDCPA apply. Appellants agree that the FDCPA applies where a merchant or vendor agrees to accept a post-dated check, as this constitutes an extension of credit or deferral of payment.

[11] All 50 states have criminalized the failure to make restitution for NSF checks within a statutory period. This statutory period is as short as two days in some states and as long as 30 days in other states. The state statutory presumptions of

(Continued on following page)

Individuals that fail to make restitution for NSF checks within the state statutory periods are not consumers and are not entitled to FDCPA protections.

## III. THE FEDERAL TRADE COMMISSION ACT IS NOT VIOLATED WHERE NO HARM TO COMMERCE OR CONSUMERS HAS BEEN DEMONSTRATED.

15 U.S.C. § 45(n) provides, in pertinent part, that the Federal Trade Commission does not have the authority

> "to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."

(App. 80).

The Appellate Court's finding that Petitioners violated the Federal Trade Commission Act is flawed because it provides no evidence of injury to commerce or to consumers, let alone "substantial injury," it ignores the "countervailing benefits to consumers" of not having to subsidize the losses businesses suffer from NSF checks, and it relies upon case law that

---

knowledge and intent in all 50 states attach following the running of these statutory periods for making restitution.

clearly relates to consumers and collection agencies. (App. 33-34).

The FTC allegation that Petitioners injured consumers is dependent on a finding by the Court that individuals who fail to make restitution for NSF checks are consumers. All 50 states define their conduct as presumptively criminal.

A consumer (undefined by the FTC Act – App. 64-80) can be defined in both the positive and the negative. In a positive sense, a consumer can be defined as an individual who purchases (with cash, checks, barter, or credit) goods or services from a merchant. The transaction between a consumer and merchant must be a consensual one – where both parties knowingly consent to the terms and conditions of the exchange. In the negative, it can be said that a consumer is not a thief, not a shoplifter, not an armed robber, not a counterfeiter, not a criminal. The transaction between a consumer and a merchant cannot involve force, coercion, fraud or misrepresentation.

Everyone is not a consumer. Whether an individual is a consumer is totally dependant upon his or her conduct at a particular moment. A person can be a consumer throughout the course of a day for one thing, a merchant for another thing, an employee while at work, and a patient as it relates to their doctor.

If an individual walks into a store with a gun and robs the cashier, the robber is not a consumer. An armed robber is not a consumer just because he walked into a store. Likewise, if an individual enters a store, hides merchandise under his coat and leaves without paying – no one seriously argues that a shoplifter is a consumer.

If a counterfeiter enters a store and pretends to pay for goods or services with counterfeit bills – no one would seriously argue that the counterfeiter is also a consumer. They have taken these goods or services and not made payment. The presentation of "phony money" does not constitute payment and it does not constitute a promise to make payment at some future date.

Similarly, if a bad check writer enters a store and pretends to pay with a NSF check – no one should seriously argue that the bad check writer is also a consumer. They have also taken goods or services and not made payment. They have not "purchased" anything, and the presentation of a "rubber check" does not constitute payment any more than passing counterfeit bills, and it does not constitute a promise to make payment at some future date.

Individuals who fail to make restitution for NSF checks are not consumers. Rather, they are consumer impersonators. They do not "purchase" anything. If the merchant accepting a check from an individual thinks he is being paid for the goods or services, but the individual knows the merchant is not being paid because there are not sufficient funds in the account or because the account is closed – there has been no consensual transaction. The merchant is not consenting to not being paid, and the misrepresentations made by the bad check writers cannot transform check fraud into a "consensual transaction" worthy of FDCPA protection.

Because individuals that write NSF checks cannot qualify as consumers there has been no injury to the class of individuals the FTC seeks to protect in Counts Six and Seven of their Complaint under the FTC Act. Additionally, since both business and real consumers incur immense losses due to the tens of millions of NSF checks that are dishonored every year, costing real consumers more that 20 billion dollars a year, the FTC cannot show that anyone except the bad check writers caused any injury to commerce or to consumers.

◆

## CONCLUSION

Petitioners owned all the rights to the NSF checks and are FDCPA-exempt creditors. The Appellate Court's substitution of a non-FDCPA "creditor test" for the statutory test was error. Individuals who issue, and fail to make restitution for, NSF checks, are not FDCPA consumers. NSF checks are not FDCPA debts. Trading a NSF checks for goods or services does not constitute a consensual FDCPA transaction. Presumptions of knowledge and intent relating to NSF checks require rebuttal by the FTC. The FTC Act was not violated because the FTC did not demonstrate substantial harm to commerce or consumers.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Dated this 3rd day of July 2008.

Respectfully submitted,

CHARLES T. HUTCHINS
*Petitioner, Pro Se*

No. ________

◆

In The
# Supreme Court of the United States

◆

CHARLES T. HUTCHINS,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent.*

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

◆

# PETITIONER'S APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

◆

## APPENDIX TABLE OF CONTENTS

Page
Third Circuit Panel Decision ............................ App. 1
US District Court Decision ................................ App. 35
Rehearing Petition Filing Extension ................ App. 58
Sur Petition for Rehearing En Banc Denial ..... App. 59
Sur Petition for Panel Rehearing Denial ......... App. 61
Writ of Certiorari Filing Extension .................. App. 63
FTC Act ................................................................ App. 64
FDCPA .................................................................. App. 81

502 F.3d 159

United States Court of Appeals, Third Circuit.
FEDERAL TRADE COMMISSION
v.
CHECK INVESTORS, INC.; Check Enforcement;
Jaredco, Inc.; Barry S. Sussman;
Elizabeth M. Sussman; Charles T. Hutchins.
Charles T. Hutchins, Appellant No. 05-3558.

Federal Trade Commission
v.
Check Investors, Inc.; Check Enforcement;
Jaredco, Inc.; Barry S. Sussman;
Elizabeth M. Sussman; Charles T. Hutchins.
Check Investors, Inc., Check Enforcement, Jaredco,
Inc., Barry S. Sussman, Appellants No. 3957.
Nos. 05-3558, 05-3957.

Argued Oct. 4, 2006.
Opinion filed: Sept. 6, 2007.

Charles T. Hutchins, Esq. (Argued), Pro se.

Stephen Robert LaCheen, Esq. (Argued), Anne M. Dixon, Esq., Philadelphia, PA, Attorneys for Appellants, Check Investors, Inc., Check Enforcement, Inc., Jaredco, Inc., and Barry Sussman.

William Blumenthal, Esq., General Counsel, Federal Trade Commission, John F. Daly, Esq., Deputy General Counsel for Litigation, Federal Trade Commission; Lawrence DeMille-Wagman, Esq. (Argued), Attorney, Federal Trade Commission, Washington, D.C., Attorneys for Appellee.

Before: McKEE, AMBRO, NYGAARD, Circuit Judges.

## OPINION

McKEE, Circuit Judge.

Check Investors, Inc., Check Enforcement, Inc., Jaredco, Inc., Barry Sussman (hereinafter collectively "Check Investors")[1] and Charles T. Hutchins[2] appeal the district court's grant of injunctive relief and $10.2 million in fines in this action that the Federal Trade Commission initiated against them. The FTC claimed that their debt collection practices violated the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 41 *et seq.*, and various provisions of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 *et seq.* For the reasons that follow, we will affirm.

## I. FACTS[3]

Check Investors is in the business of purchasing large numbers of checks written on accounts with insufficient funds ("NSF checks"). The payors of those checks typically wrote them in connection with retail transactions and purchases. Check Investors purchased over 2.2 million NSF checks having an estimated face value of approximately $348 million. The checks were purchased from companies such as Telecheck, Inc., Certegy, Inc., and Cross Check, Inc. (collectively "Telecheck").

---

[1] Barry Sussman is or was the Vice-President of Check Investors, Inc., and the President of Check Enforcement, Inc., and Jaredco, Inc.

[2] Charles T. Hutchins is or was general counsel to Check Investors, Jaredco and Check Enforcers.

[3] The facts are not in dispute.

Telecheck is in the business of guaranteeing checks tendered to pay for consumer transactions. When checks are dishonored, Telecheck pays the merchant/payee the full face value of the check, thereby making the merchant whole. The merchant therefore has no need to attempt to collect the check from the payor/customer. In return for the payment, the merchant assigns all of its rights and benefits to Telecheck, and Telecheck then attempts to collect on the defaulted check to reimburse itself for its payment.

Telecheck first attempts to collect by making three electronic re-presentments of an NSF check to the financial institution the instrument was drawn on. If unsuccessful, Telecheck then sends the payor notices and attempts to contact him/her by telephone. This process may continue for approximately sixty to ninety days. If these efforts fail, Telecheck hires a debt collector, who makes further attempts to collect on the check from the payor. If the debt collector is not able to collect after six months to a year, Telecheck contracts with a second debt collector. Both the first and second debt collectors work on a contingency basis, and, if successful, will receive one-third of the payment received. If the second debt collector is also unsuccessful, Telecheck sells the rights it acquired from the original merchant to Check Investors, and Check Investors initiates additional collection efforts.

Initially, Check Investors collected NSF checks on behalf of large retail clients. However, by 2002 it was purchasing NSF checks from check guarantee companies such as Telecheck for pennies on the dollar and collecting on its own behalf as part of the process we have just described.

According to the Federal Trade Commission, Check Investors was the brainchild of Barry Sussman. After graduating from law school (and after serving time in prison for attempting to collect debts by posing as an FBI agent), Sussman theorized that if a debt collection business collected only debts it actually owned based on purchasing NSF checks, it would not be subject to the FDCPA, and would therefore be free to use collection techniques prohibited by the FDCPA such as harassment and deception.

In collecting checks, Check Investors routinely added a fee of $125 or $130 to the face amount of each check; an amount that exceeded the legal limit for such fees under the laws of most states. Check Investors would then aggressively dun the defaulting payors without disclosing either the original face amount of the check, or that the amount it was demanding in "satisfaction" of the check included a fee that was higher than permitted under the laws of the applicable state.

Check Investors used both dunning letters and phone calls to collect debts. However, its primary *modus operandi* was to accuse consumers of being criminals or crooks, and threatening them with arrest and criminal or civil prosecution. The collectors it employed were provided with a script that directed them to begin calls by advising consumers that a "criminal complaint recommendation" was pending, and that the consumer would be arrested and prosecuted if he/she did not pay the amount demanded in full. Collectors were allowed to personalize the approach they used, but the approach always focused on threats of prosecution. By way of example, one of Check Investor's collectors left the following message on a consumer's answering machine:

> This message is for the criminal check writer, Stephanie ______. If you think that you could rip these merchants off with your hot checks and hide behind your telephone, I guess you'll just have to explain to the judge why you stole from this merchant, from [name of merchant], with your fraudulent check. At this moment, we do not have any intentions of working this matter out with you voluntarily. You may need to turn yourself in to the local county sheriff's office.

Another consumer was told that if she did not pay, her children would "watch their mother being taken away in handcuffs," and they would "be bringing their mommy care packages in prison."

Check Investors also threatened consumers by sending a form collection letter that purported to be from defendant Hutchins, who as noted, *see* n. 2, *supra*, is an attorney. The letter informed the recipient that Hutchins had been retained by a client who was considering taking criminal or civil action. Hutchins did not actually send the letters or sign them, he had no idea about the number of letters that were sent out purporting to be from him, and he made no inquiry about the status of any of the debts underlying the letters that were sent.[4]

Check Investors' threats of prosecution were made without regard to the amount of the underlying obligation. Employees of Check Investors told one consumer who allegedly wrote an NSF check for $14.70 that she would be "sitting in jail" unless she immediately paid $144.70 (the amount of the original check plus Check Investors' additional fee of $130). Faced with the threat, the consumer paid the full amount demanded.

Check Investors' threats of prosecution were all false. It never notified law enforcement authorities, nor did it take any steps to initiate civil suit against any consumer. Indeed, perhaps because of the small face amount of many of the debts it was collecting,

---

[4] Hutchins claims that he established numerous procedures to screen out innocent victims of fraud, identity theft, checks listed in bankruptcy, stop-payment checks and disputed checks to ensure that Check Investor's recovery actions related only to NSF checks.

Hutchins conceded that it would have been a "ridiculous proposition" to file suit.

Check Investors' tactics apparently knew no limits. It routinely contacted family members of obligors. In one case, Check Investors' repeatedly called a 64-year old mother regarding her son's debt; fearing that her son would be arrested and carted off to jail, she paid the amount of the demand. Another technique that Check Investors employed can best be described as "saturation phoning." One consumer stated that Check Investors' collectors called him 17 times in 10 minutes. Collectors also used abusive language, referring to consumers as "deadbeats," "retards," "thieves," and "idiots." The tactics often yielded results. Between January 1, 2000, and January 6, 2003, Check Investor's collection efforts netted $10.2 million from more than 42,000 consumers.

## II. DISTRICT COURT PROCEEDINGS

On May 12, 2003, the Federal Trade Commission filed a seven-count complaint in the United States District Court for the District of New Jersey against Check Investors[5] and Hutchins alleging that they had violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and various provisions the FDCPA, in their attempts to collect from consumers who had written NSF checks. More specifically, the FTC alleged that Check Investors was a "debt collector," collecting "debts", within the meaning of the FDCPA. The complaint further alleged that, in the course of collecting debts, Check Investors had violated, *inter alia,* 15 U.S.C. § 1692d (by using abusive language, and calling consumers repeatedly); § 1692e (by falsely representing that communications came from an attorney, by falsely representing that the consumer would be arrested or imprisoned or had committed a crime, and by falsely threatening legal action); and § 1692f (by adding impermissible charges to the face amounts of the debts it was collecting). The complaint also alleged that many of the acts that violated the FDCPA also violated the FTC Act. The FTC sought to enjoin Check Investors' conduct and obtain restitution for injured consumers, including a refund of the money Check Investors had collected using these techniques.

---

[5] Barry Sussman's wife, Elisabeth Sussman, was also named as a defendant. However, on October 5, 2004, the district court entered a Stipulation and Order settling all claims against her.

The district court issued a temporary restraining order enjoining Check Investors from engaging in the conduct alleged in the FTC's complaint, and the court also froze most of Check Investors' assets.[6] On August 14, 2003, the district court entered a preliminary injunction against Check Investors, which continued the injunctive provisions and the asset freeze of the TRO.

---

[6] Check Investors did not deny the tactics that FTC alleged. Rather, it insisted that the NSF obligations it was attempting to collect were not subject to the FDCPA or the FTC Act.

Both parties thereafter filed cross-motions for summary judgment. The district court granted the FTC's motion and denied Check Investors' motion. Check Investors did not dispute that it engaged in any of the conduct alleged in the FTC's complaint, and there was therefore no genuine issue of material fact about its collection tactics. Rather, Check Investors opposed the FTC's motion for summary judgment (and supported its own motion for summary judgment) by arguing that the FDCPA did not apply because it was collecting NSF checks that it had purchased outright from the original payees. According to Check Investors, it was therefore acting as a creditor collecting its own obligations rather than as debt collector collecting obligations owed to a third party.

Check Investors also argued that the payors on the NSF checks it had purchased had violated state laws pertaining to presenting "bad checks" and by committing fraud. Accordingly, in Check Investors view, the payors should be considered criminals or tortfeasers, not consumers, and they were therefore not entitled to the consumer protection of the FDCPA.

The district court rejected these arguments, in part because Check Investors presented no evidence to show that all the payors in question had the intent required for criminal or civil liability when they wrote the checks. The court also held that persons who write NSF checks are entitled to the FDCPA's protections in any event. The district court thus held that Check Investors was a "debt collector" collecting "debts" within the meaning of the FDCPA, and that it was therefore subject to the prohibitions that Act places on debt collectors' efforts to collect debts. Finally, the court held that Check Investors made material misrepresentations in the course of its collections, and that these misrepresentations also violated the FTC Act.

The district court permanently enjoined Check Investors from engaging in any debt collection activities or selling any of the debts that consumers purportedly owed to it. The court concluded that all defendants were jointly and severally liable to the FTC for restitution in the amount of $10,204,445.00. Thereafter, Hutchins (No. 05-3558), and Check Investors (No. 05-3957) appealed the court's ruling.[7]

## III. THE FAIR DEBT COLLECTION PRACTICES ACT

"The FDCPA was enacted in 1977 as an amendment to the Consumer Credit Protection Act 'to protect consumers from a host of unfair, harassing, and deceptive collection practices without imposing unnecessary restrictions on ethical debt collectors.'" *Staub v. Harris*, 626 F.2d 275, 276-77 (3d Cir.1980)

---

[7] Check Investors has filed a brief in support of its appeal and has joined in the brief filed by Hutchins.

(quoting Consumer Credit Protection Act, S.Rep. No. 95-382, at 1-2 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1696). "The primary goal of the FDCPA is to protect consumers from abusive, deceptive, and unfair debt collection practices, including threats of violence, use of obscene language, certain contacts with acquaintances of the consumer, late night phone calls, and simulated legal process." *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1324 (7th Cir.1997) (citation omitted). "A basic tenet of the Act is that all consumers, even those who have mismanaged their financial affairs resulting in default on their debt, deserve the right to be treated in a reasonable and civil manner." *Id.* (citation omitted).

Although Check Investors uses broad strokes to paint all of the payors of its NSF checks as deadbeats, criminals and/or tortfeasors, Congress's findings in enacting the FDCPA are to the contrary. The relevant Senate report noted, *inter alia,* that

> [o]ne of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are "deadbeats." In fact, however, there is universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay debts is minuscule.

S.Rep. No. 93-382, at 2 (1977), reprinted in 1977 U.S.C.C.A.N. at 1696. Rather, Congress recognized that "the vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness or marital difficulties or divorce." *Id.* Congress also recognized that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692a. Thus, Congress concluded that "[t]he issue is not one of uncollected debts, but rather whether or not consumers must lose their civil rights and be terrorized and abused by unethical debt collectors." H.R.Rep. No. 95-131, at 3 (1977).

"In the most general terms, the FDCPA prohibits a debt collector from using certain enumerated collection methods . . . to collect a 'debt' from a consumer." *Bass,* 111 F.3d at 1324. The FDCPA prohibits debt collectors from, *inter alia,* engaging in any conduct "the natural consequence of which is to harass, oppress, or abuse any person," 15 U.S.C. § 1692d; from using "any false, deceptive, or misleading representations or means in connection with the collection of any debt," 15 U.S.C. § 1692e; or from using "unfair or unconscionable means to collect or attempt to collect any debt," 15 U.S.C. § 1692f.

Within each broad category of prohibited conduct, the FDCPA includes examples of specific practices that are prohibited. Those prohibited practices could have been modeled on the various tactics Check Investors employed to collect the NSF checks it purchased. For example, the prohibition on harassing, oppressive or abusive practices precludes a debt collector from using abusive language, 15 U.S.C. § 1692d(2), or from repeatedly calling a consumer, 15 U.S.C. § 1692d(3). The prohibition on false, deceptive or misleading representations precludes a debt collector from falsely representing that a dunning letter was sent by an attorney, 15 U.S.C. § 1692e(3), from falsely representing that nonpayment will result in arrest or imprisonment, 15 U.S.C. § 1692e(4), or that a consumer committed a crime, 15 U.S.C. § 1692e(7). The prohibition on unfair or unconscionable practices precludes a debt collector from adding any charge to the underlying debt unless that charge is authorized by law or the agreement creating the debt. 15 U.S.C. § 1692f(1).

The FDCPA allows consumers to sue an offending creditor for actual damages, attorney's fees and costs, as well as statutory damages up to $1,000. 15 U.S.C. § 1692k(a). The FDCPA also provides the FTC with enforcement authority. 15 U.S.C. § 1692*l*(a).

## IV. THE FEDERAL TRADE COMMISSION ACT

Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits, *inter alia*, "unfair or deceptive acts or practices in or affecting commerce." Section 13(b), 15 U.S.C. § 53(b), provides that "in proper cases the Commission may seek, and after proper proof, the [district] court may issue, a permanent injunction."

"The deceptive acts or practices forbidden by the [FTC] Act include those used in the collection of debts." *Trans World Accounts, Inc. v. FTC,* 594 F.2d 212, 214 (9th Cir.1979). Trans World was a debt collection agency that sent out a series of five or six dunning letters, in a format that closely resembled Western Union Telegrams, that threatened immediate legal action against the debtors if payment was not made within a specified period. *Id.* In reality, however, it took Trans World about ninety days from the receipt of the first letter to even consider whether legal action should be taken against any individual debtor. *Id.*

The FTC issued an administrative complaint charging Trans World with the commission of unfair and deceptive practices in violation of Section 5 of the FTC Act. *Id.* The complaint alleged that the letters misrepresented the imminence of legal action, and that they were deceptive in format because they were made to look like Western Union telegrams. *Id.* An administrative law judge entered a decision sustaining the allegations of the complaint, and Trans World appealed to the FTC. *Id.* The FTC adopted, in large measure, the findings and conclusions of the ALJ and entered an order prohibiting the practices used in the collection process. *Id.* On Trans World's petition for review, the Court of Appeals for the Ninth Circuit found, *inter alia,* that there was substantial evidence supporting the finding of deception in the use of the letter format that closely resembled telegrams, which letters threatened legal action when no action was contemplated. *Id.* at 215.

In *Floersheim v. FTC,* 411 F.2d 874 (9th Cir.1969), the seller of forms used to help creditors collect debts petitioned for review of a cease and desist order of the FTC. The court held that the evidence supported the FTC's finding that the seller's forms, which were mailed from the seller's Washington, D.C., office even though the seller lived in and sold the forms from Los Angeles, California, which repeated the words, "Washington, D.C.," and used an elaborate type style so as to simulate legal documents, were deceptive in exploiting the assumption of many low income debtors that anything that official-looking coming from Washington, D.C., had been sent by the federal government

## V. DISCUSSION

Neither Check Investors nor Hutchins disputes the FTC's claim that they employed harassing and abusive tactics to collect NSF checks or that they collected amounts in excess of the amounts allowed by law. Rather, as noted earlier, they argue that the FDCPA and the FTC Act do not apply to them because they were not collecting "debts," the people who wrote the NSF checks were not "consumers," and they were not "debt collectors," as those terms are defined in the FDCPA.[8] Each argument is discussed separately below.[9]

### A. Are the NSF Checks "Debts" Under the FDCPA?

"A threshold requirement for application of the FDCPA is that the prohibited practices are used in an attempt to collect a 'debt.'" *Zimmerman v. HBO Affiliate Group,* 834 F.2d 1163, 1167 (3d Cir.1987). Congress incorporated a broad definition of both "debt" and "debt collector" into the FDCPA in order to achieve its remedial purpose. 15 U.S.C. §§ 1692a(5), 1692a(6).

The FDCPA defines a "debt" as

> *any* obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject to the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

15 U.S.C. § 1692a(5) (emphasis added).

---

[8] These are purely legal questions over which we have plenary review. *Centerpoint Properties v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.),* 268 F.3d 205, 208 (3d Cir.2001).

[9] Check Investors makes its own arguments in its appeal and has adopted the arguments Hutchins makes in his appeal.

Appellants claim that the FDCPA does not apply to them because the NSF checks they purchased were not "debts" within the meaning of the FDCPA. They begin by noting that all 50 states criminalize the act of writing a check knowing that it will be dishonored; and that the law of many states creates a presumption of knowledge and/or willfulness when a check is written on insufficient funds and not paid within a certain period after it has been dishonored, or after the payor receives notice that it has been dishonored. Appellants also stress that since writing a fraudulent check gives rise to tort liability, and since they only attempted to collect NSF checks after a presumption of knowledge or willfulness arose under state law, their NSF checks were not "debts" within the meaning of the FDCPA because they did not arise out of a consumer "transaction." Rather, according to Appellants, their NSF checks arose out of criminal or tortious conduct.[10]

Four Courts of Appeals have rejected this argument and held that payment with a NSF check creates a "debt" as defined in the FDCPA. *See Bass,* 111 F.3d at 1322; *Duffy v. Landberg,* 133 F.3d 1120 (8th Cir.1998); *Charles v. Lundgren & Assocs.,* 119 F.3d 739 (9th Cir.1997); *Snow v. Riddle,* 143 F.3d 1350 (10th Cir.1998).

---

[10] However, Check Investors and Hutchins do not dispute the fact that the obligors they attempted to collect from used the checks in question to obtain "money, property, insurance, or services primarily for personal, family, or household purposes."

The Court of Appeals for the Seventh Circuit was first to reject this argument in *Bass,* and its analysis has been followed by three other courts of appeals. In *Bass,* the court explained:

> [T]he plain language of the Act defines "debt" quite broadly as "any obligation to pay arising out of a [consumer] transaction." In examining this definition, we first focus on the clear and absolute language in the phrase, "any obligation to pay." Such absolute language may not be alternatively read to reference only a limited set of obligations as appellants suggest. As long as the transaction creates an obligation to pay, a debt is created. *We harbor no doubt that a check evidences the drawer's obligation to pay for the purchases made with the check, and should the check be dishonored, the payment obligation remains.*

111 F.3d at 1325 (citations omitted) (emphasis added); *see also Duffy,* 133 F.3d at 1123 ("Since a check written by a consumer in a transaction for goods or services evidences the 'drawer's obligation to pay' and this obligation remains even if the check is dishonored, abusive collection practices related to the dishonored check are prohibited by the FDCPA.") (quoting *Bass,* 111 F.3d at 1325).

Although we have not yet addressed this precise issue, we have held that a transaction's status as a "debt" under the FDCPA must be determined at the time that the obligation first arose. *See Pollice v. National Tax Funding, L.P.,* 225 F.3d 379, 400 (3d

Cir.2000). In *Pollice,* we held that water and sewer obligations constituted a "debt" based on their status when they first arose, and they remained a "debt" after assignment to a collection agency. Thus, our view of a "debt" under the FDCPA is consistent with the four courts of appeals that have held that an NSF check is a "debt."

Nonetheless, Check Investors and Hutchins attempt to circumvent the impact of our analysis in *Pollice* by relying on our earlier decision in *Zimmerman v. HBO Affiliate Group,* 834 F.2d 1163 (3d Cir.1987). In *Zimmerman,* we held that the FDCPA did not apply to attempts by cable television companies to collect money from people who allegedly stole cable television signals by installing illegal antennas. *Id.* at 1167-69. Check Investors and Hutchins now argue that since the payors on its NSF checks were also subject to criminal or tort liability, *Zimmerman* compels the conclusion that the FDCPA does not apply to their collection efforts. We disagree.

In *Zimmerman,* we explained that the FDCPA was enacted to protect people who have "contracted for goods or services and [are] unable to pay for them," and that it was not intended to "protect against a perceived problem with the use of abusive practices in collecting tort settlements from alleged tortfeasors through threats of legal action." *Id.* at 1168. We also explained this in *Pollice,* 225 F.3d at 401 n. 24, by noting: "[c]learly, there was no 'debt' in *Zimmerman* because the obligations arose out of a theft rather than a 'transaction.'"

Check Investors and Hutchins argue that the payors on their NSF checks are similarly situated to the "consumers" who stole cable television signals in *Zimmerman,* and that, like those "consumers," the payors here are not entitled to the protection embodied in the FDCPA because they are criminals and tortfeasors rather than "consumers." They argue that, as in *Zimmerman,* no "debt" was created by executing the NSF checks here because there was no "transaction," as that term is commonly understood and as it is used in the FDCPA.

As the court explained in *Bass* when rejecting identical arguments there:

> Appellants misstate the law when they categorize all dishonored checks as criminal and tortious. Both under the common law of fraud, a specific intent crime, and under most criminal statutes which specifically address dishonored checks, liability attaches only if the drawer either knew or intended that the check be dishonored *at the time the check was drawn*. A bank may refuse payment on a check for a variety of reasons lacking in the necessary fraudulent intent: administrative holds on the account of which the drawer is unaware, bank error, and the drawer's reliance on deposited checks that themselves are dishonored, to name a few. Even when the drawer is at fault for the dishonor, the requisite intent may be absent – for example, when the drawer makes a simple miscalculation or has a subsequent emergency need for funds.

> We recognize that by the time a dishonored check has been turned over to a third party collector, the issuer has typically received notice of dishonor yet has still refused to pay. Nevertheless, an issuer whose intention not to pay the check arises only at some point *after* it is issued has still not, in most jurisdictions, committed a fraudulent or criminal act. The requisite knowledge or intent that the check be dishonored must arise at the time the check is written. We therefore must reject appellants' argument that all dishonored checks are fraudulent and thus not covered by the [FDCPA].

111 F.3d at 1329 (emphasis in original) (footnote omitted).

Moreover, even if some of the payors of NSF checks had engaged in fraud at the time of the transaction, the court held in *Bass* that there is no "fraud exception" in the FDCPA. Given the explicit and unambiguous text of the FDCPA, we agree.

In *Bass,* a debt collector argued that the FDCPA should not apply to debts it was collecting because it was attempting to collect an NSF check that was presumed to be fraudulent under Wisconsin law. 111 F.3d at 1329. The court of appeals rejected that argument because the presumption that the check writer engaged in fraud was rebuttable under Wisconsin law, and because the debt collector had not made the showing required to establish fraudulent intent under state law. *Id.* In rejecting the defendants' argument, the court commented that, even if the requisite intent had been established, the court would be reluctant to "create a fraud exception where none exists in the [FDCPA's] text." *Id.* at 1329-30. The court explained:

> A review of the legislative history reveals that Congress considered the entire field of defaulting debtors, stating its belief that most debtors fully intended to repay their debts. "Most" is not "all," however, yet Congress still chose not to exempt debt collectors from following the Act if they could prove that the consumer intended his check to be dishonored or accepted credit from a merchant intending default. No section of the Act requires an inquiry into worthiness of the debtor, or purports to protect only "deserving" debtors. To the contrary, Congress has clearly indicated its belief that no consumer deserves to be abused in the collection process. Moreover, we think that such a fraud exception would violate the spirit of the Act. The Act's singular focus is on curbing abusive and deceptive collection practices, not abusive and deceptive consumer payment practices. We are not unaware that in some cases . . . the absence of a fraud exception will allow consumers who intend to pass worthless checks to invoke the protections of the FDCPA. . . . Absent an explicit showing that Congress intended a fraud exception to the Act, the wrong occasioned by debtor fraud is more appropriately redressed under the statutory and common law remedies

> already in place, not by a judicially-created exception that selectively gives a green light to the very abuses proscribed by the Act.

*Id.* at 1330.

The court thereafter amplified this discussion in *Keele v. Wexler,* 149 F.3d 589 (7th Cir.1998). There, the court explained:

> We touched upon a similar request in *Bass* without formally deciding the issue, but did express at length "our discomfort with the proposition that the courts should create a fraud exception where none exists in the Act's text." Unfortunately for the [debt collector], this "discomfort" has not subsided since *Bass,* and it is time we put to rest any lingering doubts as to the nonexistence of a fraud exception to the FDCPA.

*Id.* at 595 (citation omitted). The court's analysis continued:

> [T]he FDCPA's legislative history reflects that Congress acknowledged there may be a "number of persons who willfully refuse to pay just debts," but apparently "believe[d] that the serious and widespread abuses" of debt collectors outweighed the necessity to carve out an exception for these so called "deadbeats." If the Act was designed to protect those who willfully refused to pay their debts, it makes little sense why consumers who write checks, knowing they

> will be dishonored, should not enjoy the same protections.

*Id.* at 596 (citations omitted).

We agree that, given the legislative history of the FDCPA, its structure and text, we could not craft the kind of fraud exception that underlies the arguments of Check Investors without amending the statute.

### B. The Payors of the NSF Checks are "Consumers" under the FDCPA.

As noted earlier, "[t]he FDCPA was enacted in 1997 as an amendment to the Consumer Credit Protection Act to protect consumers from a host of unfair, harassing, and deceptive collection practices without imposing unnecessary restrictions on ethical debt collectors." *Staub,* 626 F.2d at 276-77 (citation and internal quotations omitted). Check Investors and Hutchins argue that the payors of the NSF checks are not "consumers" and therefore are not protected by the FDCPA. More specifically, they argue that

> [a]n individual's conduct, when taken as a whole, determines whether he or she qualifies as a consumer for FDCPA purposes. An individual who issues a NSF check or a closed account check, in exchange for money, goods, services or insurance, and who subsequently fails to make restitution within the criminal code statutory period established by the state legislature, is not a FDCPA

> consumer because the individual has not acted like a consumer.

However, the argument ignores that the FTC's cause of action is controlled by the FDCPA. That governing statute defines "consumer" as "*any* natural person obligated or allegedly obligated to pay *any* debt." 15 U.S.C. § 1692a(3) (emphasis added). Even if we accept the claim that these payors are criminals and tortfeasors, those labels would advance neither our inquiry, nor Appellants' position, because "any" is all inclusive and does not exclude criminals or tortfeasors. Rather, it unambiguously includes them. As noted above in our discussion of the analysis in *Bass* and *Keele,* it is clear that Congress realized that some people who write "bad checks" do so knowingly and willfully and that their conduct is fraudulent. It is just as clear that Congress enacted a definition of "consumer" that did not exclude such persons from the protections they would otherwise be afforded under the FDCPA. Yet, Appellants' argument requires that we ignore the phrase: "*any* natural person," that Congress used to define "consumer."

Just as the obligations underlying the NSF checks are "debts" that the payor remains obligated to pay, *see Duffy,* 133 F.3d at 1123 ("[A] check written by a consumer in a transaction for goods or services evidences the "drawer's obligation to pay" and this obligation remains even if the check is dishonored. . . ."), the payors of those checks are "consumers" within the meaning of the FDCPA.

### C. Appellants are "Debt Collectors" and not "Creditors" Under the FDCPA.

"The FDCPA's provisions generally apply only to debt collectors." *Pollice*, 225 F.3d at 403 (citation and internal quotations omitted). "Creditors – as opposed to debt collectors – generally are not subject to the FDCPA." *Id.* (citation and internal quotations omitted). A "debt collector" is broadly defined as one who attempts to collect debts "owed or due or asserted to be owed or due another," 15 U.S.C. § 1692a(6). A "creditor" is one who "offers or extends to offer credit creating a debt or to whom a debt is owed." 15 U.S.C. § 1692a(4).

The district court held that Check Investors and Hutchins[11] are "debt collectors" as defined by the FDCPA because Check Investors obtained the "debts," i.e., the NSF checks, after they were in default.[12] It relied on our decision in *Pollice v. National Tax*

---

[11] Attorneys who regularly engage in debt collection or debt collection litigation are covered by the FDCPA, and their litigation activities must comply with the requirements of the FDCPA. *Heintz v. Jenkins*, 514 U.S. 291, 292, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995).

[12] Hutchins contends that because a check is an unconditional promise to pay, a check can never be in default. We disagree. "Default" is "the omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due." Blacks Law Dictionary 449 (8th ed. 2004). Because the checks Check Investors purchased from Telecheck had already been dishonored, they were in default when purchased. *Holmes v. Telecredit Service Corp.*, 736 F.Supp. 1289, 1293 (D.Del.1990).

*Funding, L.P., supra.* There, National Tax Funding ("NTF") purchased homeowner's water and sewer obligations from a municipality and sought to collect on those obligations for its own benefit. We held that water and sewer obligations are "debts" within the meaning of the FDCPA. We also held that NTF was a "debt collector" and that the district court should not have dismissed FDCPA claims against it. We explained:

> Courts have indicated that an assignee of an obligation is not a "debt collector" if the obligation is not in default at the time of assignment; conversely, an assignee may be deemed a "debt collector" if the obligation is already in default when it is assigned. . . . Here, there is no dispute that the various claims assigned to NTF were in default prior to their assignment to NTF. Further, there is no question that the "principal purpose" of NTF's business is the "collection of any debts," namely defaulted obligations which it purchases from municipalities.

225 F.3d at 403-404 (citations omitted). This is equally true of Hutchins and Check Investors. Nevertheless, they contend that the district court's holding that they are "debt collectors" was error because they are actually "creditors"[13] collecting debts actually

---

[13] The district court held that Check Investors and Hutchins were "debt collectors" as defined in the FDCPA. It did not address their claim that they were "creditors."

owed to them, as opposed to "debt collectors" collecting obligations owed to someone else. The FDCPA defines "creditor" as

> any person who offers or extends credit creating a debt or *to whom a debt is owed,* but such term does not include any person to the extent he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

15 U.S.C. § 1692a(4) (emphasis added). Appellants contend that because Check Investors bought the NSF checks from Telecheck, Check Investors is the actual owner of those checks and is therefore not collecting "debts of another," as a debt collector would. Rather, according to Appellants, Check Investors is actually the entity "to whom a debt is owed." They claim further that because Check Investors is owed the debt, it did not "receive[ ] an assignment or transfer" of the NSF checks "solely for the purpose of" collecting the debt for Telecheck. Thus, Appellants argue that Check Investors satisfies the statutory definition of a "creditor," and, therefore, they are not subject to the provisions of the FDCPA. Although the argument is rather clever, it is wrong. It would elevate form over substance and weave a technical loophole into the fabric of the FDCPA big enough to devour all of the protections Congress intended in enacting that legislation.

Admittedly, Check Investors appears at first blush to satisfy the statutory definition of a creditor.

As the Court of Appeals for the Seventh Circuit noted in *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir.2003), "for debts that do not originate with the one attempting collection, but are acquired from another, the collection activity related to that debt could logically fall into either category."

However, as to a specific debt, one cannot be both a "creditor" and a "debt collector," as defined in the FDCPA, because those terms are mutually exclusive. As the court explained in *Schlosser*, "[i]f the one who acquired the debt continues to service it, it is acting much like the original creditor that created the debt. On the other hand, if it simply acquires the debt for collection, it is acting more like a debt collector." *Id.* Thus, in determining if one is a "creditor" or a "debt collector," courts have focused on the status of the debt at the time it was acquired. 15 U.S.C. § 1692a controls that inquiry. That provision provides in relevant part:

> (6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . . The term does not include –
>
>> (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the

> extent such activity . . . (iii) concerns a debt which was not in default at the time it was obtained by such person. . . .

15 U.S.C. § 1692a(6)(F)(iii). In *Pollice,* we relied on this provision of the FDCPA to hold that one attempting to collect a debt is a "debt collector" under the FDCPA if the debt in question was in default when acquired. Conversely, we concluded that § 1692a means that an entity is a creditor if the debt it is attempting to collect was not in default when it was acquired. 225 F.3d at 403-04. Other courts agree. *See Schlosser,* 323 F.3d at 536; *Bailey v. Security Nat'l Servicing Corp.,* 154 F.3d 384, 387 (7th Cir.1998); *Whitaker v. Ameritech Corp.,* 129 F.3d 952, 958 (7th Cir.1997); *Wadlington v. Credit Acceptance Corp.,* 76 F.3d 103, 106-07 (6th Cir.1996); *Perry v. Stewart Title Co.,* 756 F.2d 1197, 1208 (5th Cir.1985).

Admittedly, focusing on the status of the debt when it was acquired overlooks the fact that the person engaging in the collection activity may actually be owed the debt and is, therefore, at least nominally a creditor. Nevertheless, pursuant to § 1692a, Congress has unambiguously directed our focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA. The legislative history explains the wisdom of that provision. The term "debt collector," subject to the exclusions discussed below, was intended to cover all third persons who regularly collect debts. "The primary persons intended to be covered are independent debt collectors." S.Rep. No. 95-382, at 2, 1997

U.S.C.C.A.N. at 1697. The Senate Committee explained that the FDCPA was limited to third-party collectors of past due debts because, unlike creditors, "who generally are restrained by the desire to protect their good will when collecting past due accounts," independent collectors are likely to have "no future contact with the consumer and often are unconcerned with the consumer's opinion of them." *Id.* at 1696.

Thus, as the court explained in *Schlosser*:

> Focusing on the status of the obligation asserted by the assignee is reasonable in light of the conduct regulated by the statute. For those who acquire debts originated by others, the distinction drawn by the statute – whether the loan was in default at the time of the assignment – makes sense as an indication of whether the activity directed at the consumer will be servicing or collection. If the loan is current when it is acquired, the relationship between the assignee and the debtor is, for purposes of regulating communications and collections practices, effectively the same as that between originator and the debtor. If the loan is in default, no ongoing relationship is likely and the only activity will be collection.

323 F.3d at 538.

Here, Check Investors acquired the defaulted checks only for collection purposes. Indeed, it is in business to do just that: acquire seriously defaulted debt, the age of which allows Check Investors to acquire it for a few pennies on the dollar. The low cost of acquisition allows for substantial profit if the checks are subsequently collected.[14] This is particularly true given the size of the "fees" that Check Investors adds on to each check.

The fact that the NSF checks were purchased and owned outright by Check Investors, rather than Check Investors merely receiving an assignment of the rights of the original payee is therefore irrelevant for purposes of determining whether Check Investors was acting as a debt collector or creditor. Check Investors clearly had no intention of servicing the debt. Check Investors and Hutchins do not dispute the FTC's claim that they employed harassing and abusive tactics to collect the debts they acquired and added "collection fees" that exceeded limitations imposed by state laws. No merchant worried about goodwill or the future of his/her business would have engaged in the kind of conduct that was the daily fare of the collectors at Check Investors. Neither Check Investors nor Hutchinson intended any future contact with the payees of the NSF checks they acquired, and their collection practices reflected as much. The collectors working there resorted to whatever harassment appeared likely to succeed; the only limit appears to have been a given tactic's likelihood of bearing fruit by yielding a profit. If the future of Appellants' business was in any way dependent upon their goodwill, they would not have dreamed of unleashing their collectors in this manner. Not only do we conclude that Appellants are "debt collectors" rather than "creditors," we believe that their course of conduct exemplifies why Congress enacted the FDCPA and the wisdom of doing so. It also shows why Congress has directed us to focus on whether a debt was in default when acquired to determine the status of "creditor" vs. "debt collector."

---

[14] This is particularly true given the size of the "fees" that Check Investors adds to each check. Their tactics then allow them a remarkable measure of success even though prior debt collection efforts have failed. The result is a very profitable enterprise.

### D. The Federal Trade Commission Act.

As noted earlier, Hutchins and Check Investors do not dispute the FTC's claim that their collection practices constituted unfair and deceptive practices under the FTC Act. Instead, they argue that the payors of their NSF checks were not "consumers." "[T]he deceptive acts or practices forbidden by the [FTC Act] include those used in the collection of debts." *Trans World Accounts, Inc. v. FTC,* 594 F.2d 212, 214 (9th Cir.1979). Accordingly, we must also reject the argument that the payors of the NSF checks were not "consumers" under the FTC Act.

Nevertheless, Check Investors argues that

> [t]his is not a case where consumers are being solicited to buy time-shares in non-existent condos or swamp land in Florida, and that the district court erred in determining

> that the Check Investors' practices were, in fact, deceptive as to a consumer.

Selling time shares for swamp land in Florida is but one kind of deceptive business practice. The collection techniques involved here are another. Moreover, Check Investors offered nothing in the district court to challenge the FTC's allegations that its collection practices included material misrepresentations in violation of the FTC Act. Accordingly, we will not consider that argument, raised for the first time on appeal, absent a compelling circumstance requiring us to consider it. *Srein v. Frankford Trust Co.,* 323 F.3d 214, 224 n. 8 (3d Cir.2003). Check Investors does not allege the existence of any compelling circumstance, and we can think of none. Thus, we will not consider its argument that the district court erred in finding that its practices were deceptive to a consumer.

## VI. CONCLUSION

For all of the above reasons, we will affirm the district court.

# UNITED STATES DISTRICT COURT
# FOR THE DISTRICT OF NEW JERSEY

FEDERAL TRADE
COMMISSION,

Plaintiff,

v.

Civil No. 03-2115 (JWB)

CHECK INVESTORS, INC.,
*et al.*,

Defendants.

## FINAL ORDER FOR JUDGMENT AND PERMANENT INJUNCTION AS TO DEFENDANTS CHECK INVESTORS, INC., CHECK ENFORCEMENT, INC., JAREDCO, INC., BARRY SUSSMAN, AND CHARLES HUTCHINS

The Federal Trade Commission ("FTC") commenced this civil action on May 12, 2003, pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 **U.S.C.** 53(b), and Section 814(a) of the Fair Debt Collection Practices Act ("FDCPA"), 15 **U.S.C.** § 1692*l*(a). The FTC seeks both permanent injunctive relief and consumer redress for alleged unfair or deceptive acts or practices by Defendants in connection with the collection of purported debts from consumers. The defendants, as named in the First Amended Complaint for Injunctive and Other Equitable Relief ("Complaint"), are Check Investors, Inc., Check Enforcement, Inc., Jaredco, Inc., Barry

Sussman, and Charles Hutchins. The Complaint names Elisabeth Sussman as a relief defendant.

This Court has previously entered a stipulated final order for permanent injunction and settlement of claims for monetary relief as to relief defendant Elisabeth Sussman.

The FTC has now moved this Court for summary judgment against defendants Check Investors, Inc., Check Enforcement, Inc., Jaredco, Inc., Barry Sussman, and Charles Hutchins ("Defendants") pursuant to Federal Rule of Civil Procedure 56. Defendants have cross-moved for summary judgment.

A hearing was held on January 24, 2005. The Court, having considered the arguments, memoranda, and exhibits filed in support of and in opposition to this motion, and all other pleadings and files in this action, as well as the oral arguments of the parties, and now being fully advised in the premises, and for the reasons set forth in this Court's Opinion of even date herewith, hereby grants the FTC's motion for summary judgment and denies the Defendants' cross-motion.

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to issue injunctive and other relief against violations of the FTC Act and, in the exercise of its equitable jurisdiction, to award redress and restitution to remedy the injury to consumers, order disgorgement of profits resulting from Defendants' unlawful acts or practices, and issue other ancillary equitable relief.

This Court is persuaded that the danger of future violations by Defendants justifies the issuance of injunctive relief. Specifically, it is proper in this case to issue a permanent injunction that: (a) prohibits Defendants from engaging in debt collection activities; (b) prohibits Defendants from making, in connection with the collection or attempted collection of any debt, certain misrepresentations; and (c) provides such other ancillary relief as is necessary to assist the FTC and the Court in monitoring Defendants' compliance with such a permanent injunction.

It is proper in this case to enter a monetary judgment against Defendants, jointly and severally, to redress consumer injury resulting from violations of Section 5(a) of the FTC Act and the FDCPA by Defendants. The FTC is entitled to judgment against Defendants, jointly and severally, in the amount of $10,204,445, the net consumer injury caused by them, even though this amount may exceed their unjust enrichment.

This action and the relief awarded herein are in addition to, and not in lieu of, other remedies as may be provided by law, including both civil and criminal remedies. Pursuant to Federal Rule of Civil Procedure 65(d), the provisions of this Order are binding upon each Defendant, their successors and assigns, and their officers, agents, servants, employees and attorneys, and upon those persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise. Entry of this Order is in the public interest.

IT IS, THEREFORE, ON THIS ___ DAY OF JULY, 2005,

**ORDERED, ADJUDGED AND DECREED** AS FOLLOWS:

## DEFINITIONS

(1.) For the purposes of this Order, the following definitions shall apply:

**A.** "Consumer" means any natural person obligated or allegedly obligated to pay any debt.

**B.** "Creditor" means any person or entity who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person or entity to the extent such person or entity receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt.

**C.** "Debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment, including, but not limited to, overdue obligations (such as medical bills that were originally payable in full within a certain time period), dishonored checks that were tendered in payment for goods or services acquired or used primarily for personal, family, or household purposes, and student loans.

**D.** "Debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. The term does not include (A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor; (B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts; (C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties; (D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt; (E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction, involving the creditor.

**E.** "Debt collection activities" means any activities of a debt collector to collect or attempt to collect a debt.

**F.** "Assisting others" means providing any of the following goods or services to any person or entity: (a) performing customer service functions, including but not limited to receiving or responding to consumer complaints; (b) formulating or providing, or arranging for the formulation or provision of, any telephone sales script or any other written marketing material, including, but not limited to, the text of any Internet website, email or other electronic communication; (c) providing names of, or assisting in the generation of, potential customers; (d) performing marketing services of any kind; and (e) acting as an officer or director of a business entity.

**(2.)** Defendants are permanently restrained and enjoined from engaging in debt collection activities or assisting others engaged in debt collection activities. Nothing in this Order shall be read as an exception to this Section **2**.

**(3.)** In connection with the collection or attempted collection of any debt, Defendants and any person or entity through which they do business, and their successors, assigns, officers, agents, servants, employees, attorneys, and those other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby permanently restrained and enjoined from:

**A.** Violating the FDCPA, 15 **U.S.C.** § 1692 *et* ***seq.***, including but not limited **to**:

**i.** Violating Section 805(b) of the FDCPA, 15 **U.S.C.** § 1692c(b), by communicating with third parties for purposes other than acquiring location information about a consumer, without having obtained directly the prior consent of the consumer or the express permission of a court of competent jurisdiction, and when not reasonably necessary to effectuate a post judgment judicial remedy;

**ii.** Violating Section 806 of the FDCPA, 15 **U.S.C.** § 1692d, by engaging in conduct the natural consequence of which is to harass, oppress, or abuse a person, including, but not limited to (a) using obscene or profane language or language the natural consequence of which is to abuse the hearer, in violation of section 806(2) of the FDCPA, 15 **U.S.C.** § 1692d(2); and (b) causing a telephone to ring or engaging a person in telephone conversation repeatedly or continuously with the intent to annoy, abuse, or harass a person at the number called, in violation of section 806(5) of the FDCPA, 15 **U.S.C.** § 1692d(5);

**iii.** Violating Section 807 of the FDCPA, 15 **U.S.C.** § 1692e, by using false, deceptive, or misleading representations or means, including, but not limited to (a) falsely representing the character, amount, or legal status of a debt, or any services rendered or compensation which may be lawfully received by a debt collector for collection of a debt, in violation of sections 807(2)(A) and (B) of the FDCPA, 15 **U.S.C.** §§ 1692e(2)(A) and (B); (b) falsely representing or implying that an individual is an attorney or that a communication is from an attorney, in violation of section 807(3) of the FDCPA, 15 **U.S.C.** § 1692e(3); (c) falsely representing or implying that nonpayment of a debt will result in the arrest or imprisonment of a person or seizure, garnishment, or attachment of a person's property or wages, when such action is not lawful or when the party has no intention of taking such action, in violation of section 807(4) of the FDCPA, 15 **U.S.C.** § 1692e(4); (d) threatening to take action that the party does not intend to take, such as filing a lawsuit, in violation of section 807(5) of the FDCPA, 15 **U.S.C.** § 1692(5); (e) falsely representing or implying that a consumer committed a crime or other conduct in order to disgrace the consumer, in violation of section 807(7), 15 **U.S.C.**

§ 1692e(7); and (f) using false representations or deceptive means to collect or attempt to collect a debt or to obtain information concerning a consumer, in violation of section 807(10) of the FDCPA, 15 U.S.C. § 1692e(10);

**iv.** Violating Section 808(1) of the FDCPA, 15 U.S.C. § 1692f(1), by using unfair means to collect or attempt to collect a debt, including but not limited to collecting amounts (including any interest, fee, charge, or expense incidental to the principal obligation) not authorized by the agreement creating the debt or permitted by law; and

**v.** Violating Section 809(a) of the FDCPA, 15 U.S.C. §1692g(a), by failing to notify consumers of their right to dispute and obtain verification of their debts and to obtain the name of the original creditor, either in the initial communication with consumers by any party, or within five days thereafter;

**B.** Misrepresenting, directly or by implication, the amount that a consumer owes to satisfy any debt or alleged debt;

**C.** Misrepresenting, directly or by implication, that any person is an attorney or that such person's communication is from an attorney;

**D.** Misrepresenting, directly or by implication, that nonpayment of a debt or alleged debt will result in a consumer's arrest or imprisonment, or seizure, garnishment, or attachment of a consumer's property or wages;

**E.** Misrepresenting, directly or by implication, that any person intends to take legal action against a consumer;

**F.** Misrepresenting, directly or by implication, that a consumer has committed a crime by issuing a dishonored check;

**G.** Misrepresenting, directly or by implication, any other fact material to a consumer's decision to pay a debt or alleged debt; and

**H.** Assisting others who violate any provision of this Section **3**.

## RESTRICTIONS ON THE SALE OF CONSUMER DEBT ACCOUNTS

**4.** Defendants and any person or entity through which they do business, and their successors, assigns, officers, agents, servants, employees, attorneys, and all those other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are permanently restrained and enjoined from hereafter selling, renting, leasing, or otherwise transferring accounts or claims arising from debts owed or purportedly owed by consumers to Defendants or their affiliates.

## MONETARY RELIEF

**5.** Judgment is hereby entered against Defendants, jointly and severally, in the amount of TEN MILLION TWO HUNDRED FOUR THOUSAND FOUR HUNDRED FORTY FIVE DOLLARS ($10,204,445, with post-judgment interest at the legal rate, for equitable monetary relief, including but not limited to consumer redress, and for paying any attendant expenses of administering any redress fund. The monetary judgment set forth in this Section 5 is enforceable against any asset owned jointly by, on behalf of, for the benefit of, or in trust by or for, any Defendant, whether held as tenants in common, joint tenants with or without the right of survivorship, tenants by the entirety, and/or community property.

**6.** Any funds or assets received by the FTC pursuant to this Section 5 above shall be deposited into a fund administered by the FTC or its agent to be used for equitable relief, including but not limited to consumer redress and any attendant expenses for the administration of any redress funds. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after redress is completed, the FTC may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Defendants' practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited to the U.S. Treasury as equitable disgorgement. Defendants shall have no right to challenge the FTC's choice of remedies or the manner of distribution.

**7.** Defendants shall make available to the FTC all computer files and information in their possession, control, or custody, for each Eligible Consumer, including as available: the Eligible Consumer's name, most recent known address and telephone number; the date and amount of payment made by the Eligible Consumer, the face value of the dishonored check or other debt purportedly owed by the Eligible Consumer, and the date and amount of any refunds, as shown in Defendants' records. For purposes of Section 5 above, "Eligible Consumer" shall mean every consumer who has made a payment to any Defendant.

**8.** The judgment entered pursuant to Section 5 above is equitable monetary relief, solely remedial in nature, and not a fine, penalty, punitive assessment or forfeiture.

**9.** Defendants are hereby required, in accordance with 31 **U.S.C.** § 7701, to furnish to the FTC their tax identification numbers, which shall be used for purposes of collecting and reporting on any delinquent amount arising out of this Order.

## TURNOVER OF FROZEN ASSETS

**10.** In order partially to satisfy the monetary judgment set forth in Section 5 of this Order, any financial or brokerage institution, escrow agent, title company, commodity trading company, business entity, or person, whether located within the United States or outside the United States, that holds, controls or maintains accounts or assets of, on behalf of, or for the benefit of, any Defendant shall turn over such account or asset to the FTC within five (5) business days of receiving notice of this Order by any means, including but not limited to via facsimile. In particular:

(a) Bank of New York shall, within five (5) business days of receiving notice of this Order by any means, including but not limited to via facsimile, transfer to the FTC or its designated agent (i) all assets held in account numbers xxxxxxxxxx, in the name of Check Investors, Inc., xxxxxxxxxx, in the name of Jaredco, xxxxxxxxxx, in the name of Jaredco, xxxxxxxxxx, in the name of Goldman & Co, xxxxxxxxxx, in the name of Check Enforcement, xxxxxxxxxx, in the name of Check Enforcement, and xxxxxxxxxx, in the name of Check Investors, and (ii) 314 $20 gold coins, 55 1 oz. Austrian Philharmonic gold coins, and 65 1 oz. Krugerrand gold coins contained in safe deposit box number xxx-xxxxxxx located at Bank of New York, Branch #250, 1 Harmon Plaza, Secaucus, New Jersey;

(b) Fleet Bank shall, within five (5) business days of receiving notice of this Order by any means, including but not limited to via facsimile, transfer to the FTC or its designated agent (i) all assets held in account number xxxxxxxxxx, in the name of Check Investors, and (ii) 67 $20 gold coins contained in safe deposit box number xxxxx-x located at Fleet Bank, Branch #93053, 154 Main Street, Fort Lee, New Jersey;

(c) HSBC shall, within five (5) business days of receiving notice of this Order by any means, including but not limited to via facsimile, transfer to the FTC or its designated agent all assets held in account number xxxxxxxxxx, in the name of Goldmanco;

(d) RBC Dain Rauscher shall, within five (5) business days of receiving notice of this Order by any means, including but not limited to via facsimile, liquidate all holdings in account number xxxx-xxxx-xxxx, in the name of Goldmanco, and transfer the proceeds of such liquidation to the FTC or its designated agent; and

(e) Wells Fargo Bank shall, within five (5) business days of receiving notice of this Order by any means, including but not limited to via facsimile, transfer to the FTC or its designated agent all assets held in account numbers xxxxxxxxxx, in the name of Check Investors, and xxxxxxxxxx, in the name of Check Investors.

**11.** In order to partially satisfy the monetary judgment set forth in Section 5 of this Order, Defendants shall, within five (5) business days of the date of entry of this Order, transfer to the FTC or its designated agent (i) 200 $20 gold coins purchased from National Gold Exchange, (ii) 20 1 **oz.** Austrian Philharmonic gold coins purchased from National Gold Exchange, (iii) one $5 Indian Head gold coin (1911-D MS64) purchased from National Gold Exchange,

(iv) one $10 Liberty Head gold coin (1876-CC MS63) purchased from National Gold Exchange, (v) one $2.5 Liberty Head gold coin (1880 MS66) purchased from National Gold Exchange, (vi) 115 1 oz. Krugerrand gold coins purchased from Kitco, Inc., (vii) ten 1 oz. gold bars purchased from Kitco, Inc., (viii) ten Kilo Nugget (Kangaroo) coins (represented by Perth Mint certificates) purchased from Kitco, Inc., and (ix) one 400 oz. gold bar purchased from Kitco, Inc.

12. In order partially to satisfy the monetary judgment set forth in Section 5 of this Order, each Defendant shall provide an accounting of, and turn over to the FTC, within fifteen (15) business days following the entry of this Order, all assets, real and personal, where ever located within the United States held either: (a) by such Defendant, (b) for such Defendant's benefit, or (c) under such Defendant's direct or indirect control, jointly or singly, including, but not limited to, all assets placed in trust by, for, for the benefit of, on account of, or on behalf of any Defendant.

13. In order partially to satisfy the monetary judgment set forth in Section 5 of this Order, each Defendant shall provide an accounting of, and repatriate and turn over to the FTC, within fifteen (15) business days following the entry of this Order, all assets, real and personal, where ever located in foreign countries held either: (a) by such Defendant, (b) for such Defendant's benefit, or (c) under such Defendant's direct or indirect control, jointly or singly, including, but not limited to, all assets placed in trust

by, for, for the benefit of, on account of, or on behalf of any Defendant.

14. For a period of ten (10) years from the date of entry of this Order, Defendants, in connection with any business where any such defendant is the majority owner or otherwise controls the business, and their agents, employees, officers, corporations, successors, and assigns, and those persons and entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby restrained and enjoined from failing to create and retain the following records:

**A.** Normal and ordinary accounting records as required by generally accepted accounting standards that reflect profit and loss, assets and liabilities, and the disbursement of revenues;

**B.** Personnel records accurately reflecting: the name, address, and telephone number of each person employed in any capacity by such business, including as an independent contractor; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable, to the extent such information is obtained in the ordinary course of business;

**C.** Customer files containing the names, addresses, phone numbers, dollar amounts paid, quantity of items or services purchased, and description of items or services purchased, to the extent such information is obtained in the ordinary course of business;

**D.** Complaints and refund requests (whether received directly, indirectly or through any third party) and any responses to those complaints or requests;

**E.** Copies of all sales scripts, training materials, advertisements, or other marketing materials; and

**F.** All records and documents necessary to demonstrate full compliance with each provision of this Order, including but not limited to, copies of acknowledgments of receipt of this Order, required by Section 17 of this Order, and all reports submitted to the FTC pursuant to Section 16 of this Order.

15. For the purpose of monitoring and investigating compliance with any provision of this Order,

**A.** Within ten (10) days of receipt of written notice from a representative of the FTC, Defendants each shall submit additional written reports sworn to under penalty of perjury; produce documents for inspection and copying; appear for deposition; and/or provide entry during normal business hours to any business location in such defendant's possession or direct or indirect control to inspect the business operation, provided that Defendants, after attempting to resolve a dispute without court action and for good cause shown, may file a motion with the Court seeking an order including one or more of the protections set forth in Federal Rule of Civil Procedure 26(c);

**B.** In addition, the FTC is authorized to monitor compliance with this Order by all other lawful means, including but not limited to the following:

**i.** obtaining discovery from any person, without further leave of court, using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, and 45;

ii. posing as consumers and suppliers to: Defendants, their employees, or any other entity managed or controlled in whole or in part by Defendants, without the necessity of identification or prior notice;

*Provided* that nothing in this Order shall limit the FTC's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to obtain any documentary material, tangible things, testimony, or information relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C. § 45(a)(1)).

**C.** Defendants shall permit representatives of the FTC to interview any employer, consultant, independent contractor, representative, agent, or employee, who has agreed to such an interview, relating in any way to any conduct subject to this Order. The person interviewed may have counsel present.

16. In order that compliance with the provisions of this Order may be monitored:

**A.** For a period of ten (10) years from the date of entry of this Order,

**i.** Defendants Barry Sussman and Charles Hutchins each shall notify the FTC of the following:

**a.** Any changes in his residence, mailing addresses, and telephone numbers, within ten (10) days of the date of such change;

**b.** Any changes in his employment status (including self-employment) within ten (10) days of the date of such change. Such notice shall include the name and address of each business that he is affiliated with, employed by, creates or forms, or performs services for; a statement of the nature of the business; and a statement of his duties and responsibilities in connection with the business or employment;

**c.** Any changes in his name or use of any aliases or fictitious names; and

ii. Defendants Check Investors, Inc., Check Enforcement, Inc., Jaredco, Inc., Barry Sussman, and Charles Hutchins, shall notify the FTC of any changes in the corporate structure of defendants Check Investors, Inc., Check Enforcement, Inc., or Jaredco, Inc., or in any business entity that Barry Sussman or Charles Hutchins directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the filing of a bankruptcy petition; or a change in the corporate name or address, at least thirty (30) days prior to such change, *provided* that, with respect to any proposed change in the corporation about which the defendant learns less than thirty (30) days prior to the date such action is to take place, defendant shall notify the FTC as soon as is practicable after obtaining such knowledge.

**B.** One hundred eighty (180) days after the date of entry of this Order, Defendants each shall provide a written report to the FTC, sworn to under penalty of perjury, setting forth in detail the manner and form in which they have complied and are complying with this Order. This report shall include, but not be limited to:

**i.** Any changes required to be reported pursuant to subparagraph (A) above; and

ii. A copy of each acknowledgment of receipt of this Order obtained by defendant pursuant to Section 17;

**C.** For the purposes of this Order, Defendants shall, unless otherwise directed by the FTC's authorized representatives, mail all written notifications to the FTC to:

Associate Director for Financial Practices Federal
Trade Commission
600 Pennsylvania Avenue, NW, Room NJ-3158
Washington, DC 20580

**D.** For purposes of this Order, the FTC is authorized to communicate directly with Defendants, with contemporaneous notice of any such communication to Defendants' last known counsel of record.

17. For a period of ten (10) years from the date of entry of this Order,

**A.** Defendants Check Investors, Inc., Check Enforcement, Inc., and Jaredco, Inc. must deliver a copy of this Order to all of their principals, officers, directors, and managers. Defendants Check Investors, Inc., Check Enforcement, Inc., and Jaredco, Inc. also must deliver copies of this Order to all of their employees, agents, and representatives who engage in conduct related to the subject matter of the Order. For current personnel, delivery shall be within (5) days of service of this Order. For new personnel, delivery shall occur prior to them assuming their responsibilities.

**B.** For any business that defendant Barry Sussman controls, directly or indirectly, or in which he a majority ownership interest, he shall deliver a copy of this Order to all principals, officers, directors, and managers of that business. Defendant Barry Sussman must also deliver copies of this Order to all employees, agents, and representatives of that business who engage in conduct related to the subject matter of the Order. For current personnel, delivery shall be within (5) days of service of this Order upon

Defendant Barry Sussman. For new personnel, delivery shall occur prior to them assuming their responsibilities.

**C.** For any business where Defendant Barry Sussman is not a controlling person of a business but otherwise engages in conduct related to the subject matter of this Order, he must deliver a copy of this Order to all principals and managers of such business before engaging in such conduct.

**D.** For any business that defendant Charles Hutchins controls, directly or indirectly, or in which he a majority ownership interest, he shall deliver a copy of this Order to all principals, officers, directors, and managers of that business. Defendant Charles Hutchins must also deliver copies of this Order to all employees, agents, and representatives of that business who engage in conduct related to the subject matter of the Order. For current personnel, delivery shall be within (5) days of service of this Order upon Defendant Charles Hutchins. For new personnel, delivery shall occur prior to them assuming their responsibilities.

**E.** For any business where Defendant Charles Hutchins is not a controlling person of a business but otherwise engages in conduct related to the subject matter of this Order, he must deliver a copy of this Order to all principals and managers of such business before engaging in such conduct.

**F.** Defendants each must secure a signed and dated statement acknowledging receipt of the Order, within thirty (30) days of delivery, from all persons receiving a copy of the Order pursuant to this Section 17.

## ACKNOWLEDGMENT OF RECEIPT OF ORDER

18. Within five (5) business days after entry of this Order, Defendants each shall submit to the FTC a truthful sworn statement that shall acknowledge receipt of this Order.

## RETENTION OF JURISDICTION

19. IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification and enforcement of this Order.

/s/ John W. Bissell
JOHN W. BISSELL
Chief Judge
UNITED STATES DISTRICT COURT

## UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. *05-3558 & 05-3957*

FTC v. Check Investors, Inc.

To: Clerk

1) Motion by Appellants Check Investors, Inc., Check Enforcement, Inc., JAREDCO, and Barry Sussman for Extension of Time to File Petition for Rehearing

At the direction of the Court, the foregoing motion is granted. The petition for rehearing shall be filed on or before December 6, 2007.

For the Court,

/s/ Marcia M. Waldron
Clerk

Dated: November 29, 2007

ARL/cc: AMD; SRL; JFD; LDW

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-3558

FEDERAL TRADE COMMISSION

v.

CHECK INVESTORS, INC.; CHECK
ENFORCEMENT; JAREDCO, INC.;
BARRY S. SUSSMAN; ELIZABETH M. SUSSMAN;
CHARLES T. HUTCHINS

Charles T. Hutchins, Appellant

No. 05-3957

FEDERAL TRADE COMMISSION

v.

CHECK INVESTORS, INC.; CHECK
ENFORCEMENT; JAREDCO, INC.;
BARRY S. SUSSMAN; ELIZABETH M. SUSSMAN;
CHARLES T. HUTCHINS

Check Investors, Inc., Check Enforcement,
Jaredco, Inc., Barry S. Sussman, Appellants

## SUR PETITION FOR REHEARING EN BANC

BEFORE: SCIRICA, *Chief Judge*, SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, JORDAN, HARDIMAN *Circuit Judges* and NYGAARD, *Senior Circuit Judge*

The petitions for rehearing on behalf of Appellants in the above-entitled cases, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petitions for rehearing en banc are hereby **DENIED**.

**IT IS SO ORDERED.**

By the Court,

/s/ Theodore A. McKee
Circuit Judge

DATED: February 6, 2008

ARL/cc: JFD; LDW; CTH

Judge Nygaard's vote is limited to panel rehearing only.

# UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-3957

FEDERAL TRADE COMMISSION

v.

CHECK INVESTORS, INC.; CHECK ENFORCEMENT; JAREDCO, INC.; BARRY S. SUSSMAN; ELIZABETH M. SUSSMAN; CHARLES T. HUTCHINS

Check Investors, Inc., Check Enforcement, Jaredco, Inc., Barry S. Sussman

Appellants

## SUR PETITION FOR PANEL REHEARING

BEFORE: McKEE, AMBRO & NYGAARD *Circuit Judges*

The petition for rehearing filed by the Appellants' in 05-3957 in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for panel rehearing is hereby DENIED.

IT IS SO ORDERED.

By the Court,

/s/ Theodore A. McKee
Circuit Judge

DATED: February 6, 2008

ARL/cc: JFD; LDW; AMD; PO; SRL

**Supreme Court of the United States**
**Office of the Clerk**
**Washington, DC 20543-0001**

**William K. Suter**
Clerk of the Court
(202) 479-3011

April 24, 2008

Mr. Peter Goldberger
Law Office of Peter Goldberger
50 Rittenhouse Place
Ardmore, PA 19003-2276

Re: Check Investors, Inc. et al.
v. Federal Trade Commission
Application No. 07A855

Dear Mr. Goldberger:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on April 24, 2008 extended the time to and including July 5, 2008.

This letter has been sent to those designated on the attached notification list.

Sincerely,

**William K. Suter**, Clerk

by /s/ Melissa Blalock
Melissa Blalock
Case Analyst

---

## FEDERAL TRADE COMMISSION

## ACT TITLE 15 – COMMERCE AND TRADE

## CHAPTER 2 – FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND PREVENTION OF UNFAIR METHODS OF COMPETITION

### SUBCHAPTER I – FEDERAL TRADE COMMISSION

**AN ACT** To create a Federal Trade Commission, to define its powers and duties, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a commission is created and established, to be known as the Federal Trade Commission (hereinafter referred to as the Commission), which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the Commissioners shall be members of the same political party. The first Commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from September 26, 1914, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed: *Provided, however,* That upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified. The President shall choose a chairman from the Commission's membership. No Commissioner shall engage in any other business, vocation, or employment. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission.

The Commission shall have an official seal, which shall be judicially notice

### § 45. Unfair methods of competition unlawful; prevention by Commission

- **(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade**
    - (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
    - (2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or

corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 et seq.), except as provided in section 406(b) of said Act (7 U.S.C. 227(b)), from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

- (3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless –
  - (A) such methods of competition have a direct, substantial, and reasonably foreseeable effect –
    - (i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or
    - (ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and
  - (B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph. If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

### • (b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph[1] (2) not later than 120 days after the date of the filing of such request.[1] So in original. Probably should be "clause".

### • (c) Review of order; rehearing

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28.

---

[1] So in original; however, should read "604(a)(3)."

[1] So in original; however, should read "604(a)(3)."

- **(d) Jurisdiction of court**

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

- **(e) Exemption from liability**

No order of the Commission or judgement of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

- **(f) Service of complaints, orders and other processes; return**

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

- **(g) Finality of order**

An order of the Commission to cease and desist shall become final –

- (1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b).
- (2) Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by –

  - (A) the Commission;
  - (B) an appropriate court of appeals of the United States, if
    - (i) a petition for review of such order is pending in such court, and
    - (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or
  - (C) the Supreme Court, if an applicable petition for certiorari is pending.
- (3) For purposes of subsection (m)(1)(B) of this section and of section 57b(a)(2) of this title, if a petition for review of the order of the Commission has been filed –
  - (A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;
  - (B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

  - (C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

- (4) In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed –

  - (A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

  - (B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

  - (C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

### • (h) Modification or setting aside of order by Supreme Court

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

### • (i) Modification or setting aside of order by Court of Appeals

If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

### • (j) Rehearing upon order or remand

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

### • (k) "Mandate" defined

As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

### • (l) Penalty for violation of order; injunctions and other appropriate equitable relief

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

- **(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure**
  - (1)
    - (A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of

objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

- (B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice –
    - (1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and
    - (2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.
- (C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1) of this section,

each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

○ (2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) of this section that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a) of this section.

○ (3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

- **(n) Standard of proof; public policy consideration**

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

# THE FAIR DEBT COLLECTION PRACTICES ACT

As amended by Public Law 104-208,
110 Stat. 3009 (Sept. 30, 1996)

---

To amend the Consumer Credit Protection Act to prohibit abusive practices by debt collectors.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Consumer Credit Protection Act (15 U.S.C. 1601 et seq.) is amended by adding at the end thereof the following new title:

## TITLE VIII – DEBT COLLECTION PRACTICES [Fair Debt Collection Practices Act]

Sec.
*801.* Short Title
*802.* Congressional findings and declaration of purpose
*803.* Definitions
*804.* Acquisition of location information
*805.* Communication in connection with debt collection
*806.* Harassment or abuse
*807.* False or misleading representations
*808.* Unfair practice
*809.* Validation of debts
*810.* Multiple debts
*811.* Legal actions by debt collectors
*812.* Furnishing certain deceptive forms
*813.* Civil liability

*814.* Administrative enforcement
*815.* Reports to Congress by the Commission
*816.* Relation to State laws
*817.* Exemption for State regulation
*818.* Effective date

### § 801. Short Title [15 USC 1601 note]

This title may be cited as the "Fair Debt Collection Practices Act."

### § 802. Congressional findings and declarations of purpose [15 USC 1692]

(a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) It is the purpose of this title to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

### § 803. Definitions [15 USC 1692a]

As used in this title –

(1) The term "Commission" means the Federal Trade Commission.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but *such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.*

(5) The term "debt" means any obligation or alleged obligation of a *consumer* to pay money arising out of a *transaction* in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household

purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 808(6), such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include –

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

## § 804. Acquisition of location information [15 USC 1692b]

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall –

(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;

(2) not state that such consumer owes any debt;

(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

(4) not communicate by post card;

(5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the

attorney fails to respond within a reasonable period of time to the communication from the debt collector.

### § 805. Communication in connection with debt collection [15 USC 1692c]

(a) COMMUNICATION WITH THE CONSUMER GENERALLY. Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt –

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antimeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) COMMUNICATION WITH THIRD PARTIES. Except as provided in section 804, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than a consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) CEASING COMMUNICATION. If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except –

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

### § 806. Harassment or abuse [15 USC 1692d]

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 603(f) or 604(3)1 of this Act.

(4) The advertisement for sale of any debt to coerce payment of the debt.

(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(6) Except as provided in section 804, the placement of telephone calls without meaningful disclosure of the caller's identity.

## § 807. False or misleading representations [15 USC 1962e]

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of –

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to –

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this title.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be

a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 603(f) of this Act.

## § 808. Unfair practices [15 USC 1692f]

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true propose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if –

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

### § 809. Validation of debts [15 USC 1692g]

(a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing –

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(6) If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the

name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

(c) The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

## § 810. Multiple debts [15 USC 1692h]

If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.

## § 811. Legal actions by debt collectors [15 USC 1692i]

(a) Any debt collector who brings any legal action on a debt against any consumer shall –

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or

(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity –

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.

(b) Nothing in this title shall be construed to authorize the bringing of legal actions by debt collectors.

## § 812. Furnishing certain deceptive forms [15 USC 1692j]

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.

(b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 813 for failure to comply with a provision of this title.

## § 813. Civil liability [15 USC 1692k]

(a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of –

(1) any actual damage sustained by such person as a result of such failure;

(2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) In determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors –

(1) in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance,

the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) An action to enforce any liability created by this title may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

### § 814. Administrative enforcement [15 USC 1692*l*]

(a) Compliance with this title shall be enforced by the Commission, except to the extend that enforcement of the requirements imposed under this title is specifically committed to another agency under subsection (b). For purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act, a violation of this title shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act, including the power to enforce the provisions of this title in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

(b) Compliance with any requirements imposed under this title shall be enforced under –

(1) section 8 of the Federal Deposit Insurance Act, in the case of –

(A) national banks, by the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks) by the Federal Reserve Board; and

(C) banks the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) section 5(d) of the Home Owners Loan Act of 1933, section 407 of the National Housing Act, and sections 6(i) and 17 of the Federal Home Loan Bank Act, by the Federal Home Loan Bank Board (acting directing or through the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions;

(3) the Federal Credit Union Act, by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(4) subtitle IV of Title 49, by the Interstate Commerce Commission with respect to any common carrier subject to such subtitle;

(5) the Federal Aviation Act of 1958, by the Secretary of Transportation with respect to any air carrier or any foreign air carrier subject to that Act; and

(6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.

(c) For the purpose of the exercise by any agency referred to in subsection (b) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this title shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this title any other authority conferred on it by law, except as provided in subsection (d).

(d) Neither the Commission nor any other agency referred to in subsection (b) may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this title.

## § 815. Reports to Congress by the Commission [15 USC 1692m]

(a) Not later than one year after the effective date of this title and at one-year intervals thereafter, the Commission shall make reports to the Congress concerning the administration of its functions under this title, including such recommendations as the Commission deems necessary or appropriate. In addition, each report of the Commission shall include its assessment of the extent to which compliance with this title is being achieved and a summary of the enforcement actions taken by the Commission under section 814 of this title.

(b) In the exercise of its functions under this title, the Commission may obtain upon request the views of any other Federal agency which exercises enforcement functions under section 814 of this title.

### § 816. Relation to State laws [15 USC 1692n]

This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this title if the protection such law affords any consumer is greater than the protection provided by this title.

### § 817. Exemption for State regulation [15 USC 1692o]

The Commission shall by regulation exempt from the requirements of this title any class of debt collection practices within any State if the Commission determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this title, and that there is adequate provision for enforcement.

### § 818. Effective date [15 USC 1692 note]

This title takes effect upon the expiration of six months after the date of its enactment, but section 809 shall apply only with respect to debts for which the initial attempt to collect occurs after such effective date.

Approved September 20, 1977

**AMENDMENTS:**

SECTION 621, SUBSECTIONS (b)(3), (b)(4) and (b)(5) were amended to transfer certain administrative enforcement responsibilities, pursuant to Pub. L. 95-473, § 3(b), Oct. 17, 1978. 92 Stat. 166; Pub. L. 95-630, Title V. § 501, November 10, 1978, 92 Stat. 3680; Pub. L. 98-443, § 9(h), Oct. 4, 1984, 98 Stat. 708.

SECTION 803, SUBSECTION (6), defining "debt collector," was amended to repeal the attorney at law exemption at former Section (6)(F) and to redesignate Section 803(6)(G) pursuant to Pub. L. 99-361, July 9, 1986, 100 Stat. 768. For legislative history, *see* H.R. 237, HOUSE REPORT No. 99-405 (Comm. on Banking, Finance and Urban Affairs). CONGRESSIONAL RECORD: Vol. 131 (1985): Dec. 2, considered and passed House. Vol. 132 (1986): June 26, considered and passed Senate.

SECTION 807, SUBSECTION (11), was amended to affect when debt collectors must state (a) that they are attempting to collect a debt and (b) that information obtained will be used for that purpose, pursuant to Pub. L. 104-208 § 2305, 110 Stat. 3009 (Sept. 30, 1996).